



DEPARTMENT OF COMMERCE

Office of the Under-Secretary for Economic Affairs

15 CFR Part 1500

[Docket No.: 210820-0165]

RIN: 0605-AA53

Concrete Masonry Products Research, Education, and Promotion Order

AGENCY: Under-Secretary for Economic Affairs, United States Department of Commerce.

ACTION: Final rule; notification of referendum.

SUMMARY: This final rule sets forth the proposed Concrete Masonry Products Research, Education, and Promotion Order, as authorized by the Concrete Masonry Products Research, Education, and Promotion Act of 2018, which establishes a Concrete Masonry Products Board (Board) composed of industry members appointed by the Secretary of Commerce (Secretary) to develop and implement programs of research, education, and promotion in the concrete masonry products industry. This final rule: defines the purpose of the program; provides for a national Board, outlining its basic structure and defining its responsibilities; establishes an assessment and provides for its collection; outlines program funding and its limits to program activities; establishes recordkeeping requirements; sets out the Department's authority to review and approve program activities; outlines the Department's enforcement authority; and sets up a referendum to determine whether the Department will rescind this Order.

DATES: *Effective date:* November 29, 2021. If the referendum fails, the Department will publish a document in the *Federal Register* to withdraw this final rule before the effective date.

Referendum dates: Registration to participate in the referendum began following the publication of the final rule on referendum procedures (86 FR 23271, May 3, 2021). The referendum period will conclude after thirty days or once all registrants have voted, whichever occurs first. The referendum begins October 15, 2021. *See* **SUPPLEMENTARY INFORMATION** for more information and details regarding referendum. The Department must receive ballots no later than midnight of the final day of the referendum period on November 15, 2021.

ADDRESSES: Voters may submit ballots via mail to United States Department of Commerce Checkoff Team, 4600 Silver Hill Road, Washington, DC 20233, or facsimile (301)278-9099.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Thompson, Communications for the Commerce Checkoff Implementation Program, Office of the Under Secretary for Economic Affairs, telephone: (202) 482-0671 or via electronic mail: michael.thompson1@trade.gov.

SUPPLEMENTARY INFORMATION: The Concrete Masonry Products Research, Education, and Promotion Act of 2018 authorizes the Concrete Masonry Products Research, Education, and Promotion Order (the Order). This document affects [15 CFR part 1500](#), subpart A. The purpose of the Order is to strengthen the position of the concrete masonry products industry in the domestic marketplace; maintain, develop, and expand markets and uses of concrete masonry products in the domestic marketplace; and promote the use of concrete masonry products in construction and building. This Order sets forth the process to establish a Concrete Masonry Products Board (the Board) composed of industry members appointed by the Secretary of Commerce (the Secretary) to develop and implement programs of research, education, and promotion in the concrete masonry products industry. The funding of the Board's activities and programs is through assessments paid by manufacturers of concrete masonry units. The initial assessment is \$.01 per concrete masonry unit sold. The Secretary will hold a

referendum among eligible manufacturers to determine whether they favor the implementation of the Order. For the Order to go into effect, there must be a majority “yes” vote by both: (1) the total number of concrete masonry unit manufacturers voting, and (2) manufacturers who operate a majority of the machine cavities operated by the manufacturers voting in the referendum. Manufacturers must register prior to midnight of the day prior to the start of the referendum period in order to vote.

The Department published the referendum procedures separately in the *Federal Register* (86 FR 23271, May 3, 2021), codified at 15 CFR part 1500, subpart B. This final rule also announces that the U.S. Department of Commerce is conducting the referendum among eligible manufacturers of concrete masonry units to determine whether they favor implementation of the program. The referendum period will conclude after thirty days or once all registrants have voted, whichever occurs first. Whether this Order will go into effect is dependent upon the outcome of the referendum. To be eligible to vote, concrete masonry unit manufacturers must have manufactured concrete masonry units within the last 180 days prior to the start of the referendum period. The Department will mail ballots to all registered concrete masonry unit manufacturers.

Pursuant to the Concrete Masonry Products Research, Education, and Promotion Act of 2018, 15 U.S.C. 8701 *et seq.* (the Act), the Department of Commerce (the Department) is enacting a research, education, and promotion program (commonly referred to as a checkoff program) for concrete masonry products. The Act also authorizes the Secretary to “issue such regulations as may be necessary to carry out [the Act] and the power vested in the Secretary under [the Act].” (*See* 15 U.S.C. 8701, 8713). This document is the final version of the Order and will be the subject of a referendum. If the manufacturers of concrete masonry units, via the referendum, approve the Order, the Secretary will appoint a Board to carry out the duties as the Order prescribes, including the collection of the assessment. Under the Order, the Secretary would establish a Board that reflects a fair, equitable, and diverse representation of the concrete

masonry products industry, reflecting the geographical distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States. An industrywide assessment of \$.01 per concrete masonry unit sold would finance the research, education, and promotion initiatives of the checkoff program. The Secretary would oversee the operations and actions of the Board.

As part of this rulemaking process, the Department published 1) a proposed Order (85 FR 52059, August 24, 2020), and 2) proposed referendum procedures (85 FR 65288 October 15, 2020). Both rules provided for a comment period that has now expired. The Department received comments on the proposed Order from 146 commenters. The comments and the Department's responses are set forth in this final rule.

I. Industry Background

While the concrete masonry product industry is of moderate size, its manufacturers populate every State in the nation as well as the District of Columbia. The nature of the industry and cost of transportation of the products is such that the customer base for concrete masonry products is very localized. Relatively small producers dominate the industry. Because they produce a commodity that is not easily differentiated by manufacturer, most of the producers acting alone do not have the resources to efficiently market the value of the product or conduct the research and education to promote market growth. Coordinated activity would enable producers to leverage economies of scale in conducting research, education, and promotion of the industry.

The Order applies to products manufactured on concrete block machines and used for construction. The Act and the Order distinguish between *concrete masonry products* and *concrete masonry units*. *Concrete masonry units* are a type of concrete masonry product with an actual width of 3 inches or greater that are manufactured from dry-cast concrete using a block

machine, including concrete block and related concrete units used in masonry applications. According to industry experts, the vast majority of these units are the hollow, loadbearing concrete blocks often referred to as “gray block.”¹ In contrast, *concrete masonry products* is a broader category that, in addition to concrete masonry units, includes hardscape products, such as concrete pavers and segmental retaining wall units, manufactured on a block machine using dry-cast concrete.

Concrete masonry products range from the paver that is of original design and very ornate to the homogenous, non-descript 8-inch x 8-inch x 16-inch concrete block. The initial rate of assessment will apply only to concrete masonry units.

To identify the affected industry, the Department used statistics for the North American Industry Classification System (NAICS) code 327331, concrete block and brick manufacturing. This industry includes the manufacturers of concrete architectural block, concrete and cinder blocks, concrete bricks, concrete patio block, concrete paving block, precast terrazzo plinth blocks, precast concrete block and brick, prestressed concrete blocks or bricks, and slumped brick.² The Department believes this NAICS classification most closely corresponds to manufacturers of the broader category of *concrete masonry products*.

Table 1: North American Industry Classification for Cement and Concrete Product Manufacturing	
Code	Title
32731	Cement manufacturing
32732	Ready-mix concrete manufacturing
32733	Concrete pipe, brick, and block manufacturing

¹ National Concrete Masonry Association (NCMA), *2019 CMU Sales Report* (Herndon, VA: NCMA, 2019); <https://ncma.org/updates/news/2019-cmu-sales-survey-released/>.

² Executive Office of the President, Office of Management and Budget, *North American Industry Classification System: United States, 2017* (Suitland, MD: Census Bureau, 2017); https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

327331	Concrete block and brick manufacturing
327332	Concrete pipe manufacturing
32739	Other concrete product manufacturing

According to estimates from the 2017 Economic Census of the U.S. Census Bureau, the block and brick manufacturing industry had nearly 700 establishments and more than 16,000 employees in 2017. From 2007 to 2017, the number of establishments, number of employees, annual payroll, value added, and value of shipments declined in the industry.³ There were 690 block and brick manufacturing establishments in 2017, down from 914 in 2007. The number of employees fell by 7,578 to 16,247 in 2017, and annual payroll fell \$152 million to \$841 million. Value added and total value of shipments also fell during this time period, down \$715 million to \$2.86 billion and down \$1.36 billion to \$4.88 billion, respectively.

Table 2: Block and Brick Manufacturers, Economic Census					
Year	Number of establishments	Number of employees	Annual payroll (\$mils)	Value added (\$mils)	Total value of shipments (\$mils)
2002	910	20,037	762	2,279	4,112
2007	914	23,825	993	3,578	6,243
2012	822	15,006	663	2,215	3,991
2017	690	16,247	841	2,863	4,882
Source: U.S. Census Bureau Economic Census					

³ The Economic Census, conducted every 5 years by the U.S. Census Bureau, is the official measure of the nation's businesses and economy.

The following is a non-exhaustive list of examples of products that would fall within the definition of a concrete masonry unit (defined in § 1500.6).:

(A) Concrete Block, including:

- (1) Gray
- (2) Architectural
- (3) Prefaced
- (4) Those joined by any method in masonry construction:
 - (i) Bed joint mortar or adhesives
 - (ii) Dry-stacked and joined by filling cores solid with grout or joined by other means
 - (iii) Post tensioned
 - (iv) Surfaced bonded
- (5) Sound wall block
- (6) Fence block
- (7) Lintel Block – while lintels designed to span an entire opening are excluded, those concrete masonry units joined to create a lintel are included.
- (8) Chimney, Pilaster, or Column Block
- (9) Screen Block – these architectural units are included if their widths are greater than 3 inches if they are made on a block machine.
- (10) Concrete Sill Block – these units and related specialty units are included if their widths are greater than 3 inches. if they are made on a block machine.
- (11) Concrete Block formed with concrete masonry face shells and other materials to create a masonry unit used in masonry construction.

(B) Concrete Brick (Architectural only)

(C) Concrete Masonry Veneer Units (greater than 3 inches in width).

Summary of Final Rule

Under the Order, the Secretary will establish a Board that ensures fair, equitable, and diverse representation of the concrete masonry products industry, reflecting the geographical distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States. An industrywide assessment would finance the research, education, and promotion initiatives of the checkoff program. The Secretary would oversee the operations and actions of the Board.

The Order addresses, among other items, establishment and membership of the Board, guidance for appointments, a nomination process, the selection of alternates, Board terms, powers and duties of the Board, programs and projects to carry out the purpose of the Act, budgets, expenses, contracts and agreements, books and records, and reporting requirements.

The Order provides the rate of assessment and that such assessments shall be paid by a manufacturer that has manufactured concrete masonry products during a period of at least 180 days prior to the date they are to pay the assessment. The initial rate of assessment is \$.01 per concrete masonry unit sold. Such manufacturers will submit their assessments to the Board quarterly. The Order allows for a change in rate if a two-thirds majority of voting members of the Board so vote. An increase or decrease can occur only once per year and the change in rate may not exceed \$.01 per concrete masonry unit sold. Finally, the assessment rate shall not be in excess of \$.05 per concrete masonry unit.

The Order provides that not less than 50 percent of assessments (less administration expenses) paid by a manufacturer shall be used to support research, education, and promotion programs and projects in support of the Geographic Region of the contributing manufacturer. The Order defines five Geographic Regions that generally reflect the northeast, southeast, middle, southwest, and northwest (plus Hawaii and Alaska) of the United States. The Board will

work with regional concrete industry groups to allocate funding and coordinate programs that have national and regional impact.

Programs for research, promotion and education will further the following goals:

- Strengthen the position of the domestic concrete masonry products industry.
- Maintain, develop, and expand markets and uses for concrete masonry products domestically.
- Promote the use of concrete masonry products in construction and building.

The Act mandates that the Department conduct a referendum among eligible manufacturers of concrete masonry products to determine whether the manufacturers favor implementation of the concrete checkoff program prior to it going into effect. Each manufacturer eligible to vote in the referendum is entitled to one vote. The Department will use Employer Identification Numbers to identify unique manufacturers. For the order to go into effect, there must be a majority “yes” vote by both: (1) the total number of concrete masonry unit manufacturers voting; and (2) manufacturers who operate a majority of the machine cavities operated by the manufacturers voting in the referendum. For more details on the referendum see the referendum procedures notice published separately the *Federal Register* (86 FR 23271, May 3, 2021).

To participate in the referendum manufacturers must register by midnight of the day prior to the start of the referendum period.

Although the Department specifically requested comments on its intended use of the Employer Identification Numbers (EIN) as an identifier of unique manufacturers, none were received. Therefore, the Department will proceed with its plan to use EIN to identify unique manufacturers eligible to vote in the referendum.

Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), first enacted in 1980 and codified at 5 U.S.C. 600-611, is intended to place the burden on the government to review all new regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization can have a bearing on its ability to comply with Federal regulations. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business; (2) to require that agencies communicate and explain their findings to the public; and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed regulatory action, it must either: 1) certify that the action will not have a significant adverse impact on a substantial number of small entities, and support such a certification declaration with a factual basis, demonstrating this outcome, or, 2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

The Department issued an IRFA and requested public comments. Those comments and the Department's responses are found in the "Public Comments" section of this final rule. The FRFA includes updates to the RFA the Department references in the responses to the IRFA public comments.

Basis and Purpose of the Rule

This action is taken under the authority of the Act, which authorizes a research, education, and promotion program for concrete masonry products, also known as a checkoff

program. The Secretary will establish this checkoff program by issuance of an order issued that is subject to approval by an industry referendum. If industry approves of the order, the program would then be carried out by a Board, which would develop research and education programs as well as efforts to promote concrete masonry products in domestic markets. Board activities would be funded by assessments on manufacturers of concrete masonry products, based on the number of concrete masonry units sold each quarter. The specific burdens for applying for Board membership and the ongoing evaluation and compliance program are detailed later in this document in the section titled “Paperwork Reduction Act”.

A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available

The final Order applies to products manufactured on concrete block machines and used for construction. As indicated by the data below and confirmed by industry experts, the industry is dominated by small entities.

The U.S. Small Business Administration size standard to qualify as a small business in this industry is 500 or fewer employees.⁴ According to Census data, there were 430 firms and 686 establishments engaged in concrete block and brick manufacturing in 2017.⁵ Of these, 401 firms, or 93 percent, employed fewer than 500 employees, and these small firms accounted for 514 establishments, or 75 percent of all establishments, and about 62 percent of industry

⁴ See “Table of Small Business Size Standards Matched to North American Industry Classification System Codes” on the U.S. Small Business Administration website. For the economic analysis, the Department used statistics for the North American Industry Classification System (NAICS) code 327331, concrete block and brick manufacturing.

⁵ A firm is a business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control and an establishment is a single physical location at which business is conducted or services or industrial operations are performed. See “Statistics of U.S. Businesses Glossary” on the U.S. Census Bureau website.

employment.⁶ Note that a single company or business can have multiple firms, and a single firm can have multiple establishments.

Table 3: Block and Brick Manufacturers 2017 by Business Size					
Size of business by number of employees	Number of firms	Number of establishments	Employment	Estimated receipts (\$mils)	Annual payroll (\$mils)
Total	430	686	16,575	4,682	814
0-4	92	92	173	56	9
5-9	66	66	432	97	19
10-19	83	87	1,168	277	56
20-99	116	152	3,851	922	185
100-499	44	117	4,607	1,506	251
500+	29	172	6,344	1,823	293
Source: U.S. Census Bureau 2017 County Business Patterns and 2017 Economic Census, Table US_6digitnaics_2017, released 03/06/2020					

Costs to Affected Entities

Assessment costs - Under this final Order, concrete masonry unit manufacturers would be required to pay assessments to the Board to fund the research, education, and promotion programs of the Board. Assessment rates are dictated by the Act, which specifies assessments of \$0.01 per unit sold, up to a maximum of \$0.05 per unit sold, with assessments increasing by no more than \$0.01 per year.

To estimate the costs to businesses, the Department estimates a range of assessment revenues, with the lower bound calculated using assessments of \$0.01 with no increases in future years and the upper bound calculated using the maximum assessment rates permitted under the Act—\$0.01 in the first year, increasing by \$0.01 in subsequent years to the maximum of \$0.05 in the fifth year and thereafter.

To estimate the number of units sold by small entities, the Department relies on industry reports that show there were 1.15 billion concrete masonry units produced in 2018. Assuming

⁶ See “2017 SUSB Annual Data Tables by Establishment Industry” on the U.S. Census Bureau website. For more information, see the County Business Patterns methodology on the Census website.

small businesses produced 60 to 75 percent of overall production, we estimate that between 690 and 862.5 million units would be produced by small businesses in the first year of the program. Based on these estimates, total estimated assessments on small businesses based on \$0.01 per unit produced would be \$6.90 million to \$8.63 million in the first year.

To estimate a lower bound on expected annual assessment costs, we assume assessments remain constant at \$0.01 for 10 years and industry production grows with inflation. Therefore, total assessments on small businesses over the next 10 years is expected to be \$6.90 million to \$8.63 million per year. The midpoint of this range, \$7.76 million, is the Department's lower bound estimate of annual costs to small businesses. This amounts to \$19,358 per firm each year.

To estimate an upper bound estimate of costs, we assume the Board institutes the maximum assessment authorized under the Act, resulting in a \$0.01 per unit assessment in year 1, \$0.02 in year 2, \$0.03 in year 3, \$0.04 in year 4, and \$0.05 in years 5 through 10. Again, assuming industry production grows with inflation, total assessments on small businesses over the next 10 years would be expected to average \$27.60 million to \$34.50 million per year. The midpoint of this range, \$31.05 million, is the Department's upper bound estimate of annual costs to small businesses. This amounts to an average of \$77,431 per firm each year.

Applying the Department's upper bound cost estimate to the receipts estimated by the Census Bureau for this industry, total costs on small businesses represent about 1.1 percent of small business receipts (shown in "Table 3: Block and Brick Manufacturers 2017 by Business Size," employment size less than 500). Again, this would be the average over the 10-year period. Assessments would be lowest in year 1 and highest in years 5 through 10.

These estimated assessment costs are based on the limited information available for the concrete and brick manufacturers industry. For this analysis, the Department relies on industry estimates for annual unit production. Because unit production is not available by business size, we estimate a range of unit production using establishment data from the U.S. Census Bureau for NAICS industry 327331. Because the number of firms estimated by industry experts differs from

the number of firms under NAICS industry 327331, we request comments regarding the number and size of entities covered under the proposed order, including whether production occurs among businesses not classified under NAICS industry 327331.

Reporting costs - In addition to assessments paid on concrete masonry units, there are reporting costs associated with adoption of this final Order. Under the proposed order, each manufacturer may be required to periodically provide to the Board such information as may be required by the Board, with the approval of the Secretary, which may include, but not be limited to, the following:

1. Number and type of concrete masonry units manufactured;
2. Number and type of concrete masonry units on which an assessment was paid;
3. Name and address of the manufacturer; and
4. Date assessment was paid on each concrete masonry unit sold.

We expect these reporting costs to be incurred with the quarterly assessments paid by manufacturers. We estimate that managers would spend 60 minutes per quarterly report.

According to the Bureau of Labor Statistics, the median pay for industrial production managers is \$50.71 per hour.⁷ Thus, we estimate that firms will pay, on average, \$202.84 for reporting costs per year.

Benefits for Affected Entities

While this final Order may result in a significant cost for a substantial number of small businesses, these costs are expected to result in benefits to businesses that are at least commensurate with these costs. The assessments pay for investments in product research, education, and promotion programs that are intended to yield direct benefits to concrete product manufacturers in the form of new markets and increased consumer demand.

⁷ See the *Occupational Outlook Handbook*, Bureau of Labor Statistics (<https://www.bls.gov/ooh/>).

Alternatives: Consideration of a De Minimis Exemption

The Department recognizes that some small businesses with minimal production in the industry may not have the resources to comply with the requirements imposed by the proposed order, and therefore, the Department may consider a *de minimis* exemption for these small businesses. A *de minimis* exemption would exclude from the order some small businesses with minimal production, based on measures of unit production, employment, receipts, machine cavities, or other relevant criteria. The Department requested comments on whether to include a *de minimis* exemption. Those that commented on a *de minimis* exemption were universally opposed to the inclusion of one. Comments in opposition included several manufacturers to which a *de minimis* exemption would apply. The Department did not receive any comments supporting the inclusion of a *de minimis* exemption. At this time the Department has decided to defer to industry preferences and will not include a *de minimis* exemption in this Order. The Department reiterates this decision in its response to comments below. This Order complies with the statutory requirements of the Act; there are no other possible alternatives to this final rule.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes

To minimize the respondent burden, the Department plans to create simple forms for ease of applying for Board membership and submitting evaluation and compliance information. Further, the Department plans to allow interested parties to apply for Board membership and submit evaluation and compliance information via email, by mail, or facsimile - at the choice of the respondent. See **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** in this preamble.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Department submitted to OMB for approval the application form individuals will complete for consideration as a Board member and the evaluation and compliance form the Board will use to assist in receiving assessments. These forms represent the information collection and recordkeeping requirements to establish the Board and to document evaluation and compliance of the program. OMB approved both forms under OMB Control Number 0605-0028.

Title: Concrete Masonry Products Research, Education, and Promotion Order.

OMB Number: 0605-0028.

Expiration Date of Approval: October 31, 2023

Type of Request: New information collection for research, education and promotion programs.

Abstract: The Department seeks to establish an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of research, education and promotion, to support the concrete masonry products industry. The Department has published an Order (15 CFR part 1500, subpart A) in the *Federal Register* to establish the program. The purpose of the Order is to strengthen the position of the concrete masonry products industry in the domestic marketplace; maintain, develop, and expand markets and uses of concrete masonry products in the domestic marketplace; and promote the use of concrete masonry products in construction and building. The Order allows a Concrete Masonry Products Board (Board) made up of industry members appointed by the Secretary to develop and implement programs of research, education, and promotion. The funding of the Board's activities and programs will be through assessments paid by manufacturers of concrete masonry units. The initial assessment will be \$.01 per concrete masonry unit sold.

The Secretary will hold a referendum among eligible manufacturers to determine whether they favor the implementation of the Order. The Order only will go into effect if the referendum results in the affirmative vote of a majority of those voting and also a majority of the block machine cavities in operation by those voting. The Secretary will then appoint members of a Board to carry out the duties prescribed in the order. Among its duties, the Board will establish an evaluation and compliance program to receive and validate assessments. After three years and five years, the Secretary will evaluate the appropriateness, effectiveness, impact of the program, and provide an accounting of assessments.

The first form of this ICR relates to the establishment of a Board. If the referendum is successful and approves the concrete masonry products order the Secretary will appoint members and establish a Board. Eligible concrete masonry product manufacturers will complete and submit an application for Board membership and will be invited to provide any additional information to support their application. The Board application form is voluntary.

The second form of this ICR relates to the evaluation and compliance program required if the referendum is successful and approves the concrete masonry products order. Eligible concrete masonry product manufacturers will complete and submit the evaluation and compliance form on a quarterly basis. Completion of the evaluation and compliance form is mandatory.

Aside from that noted above in the IRFA, there are no special skills required to complete the application for Board membership or the evaluation and compliance information.

The Authorizing Statute: 15 U.S.C. Chapter 13 (sections 8701-8717).

Board Application

Estimate of Burden: 1.0 hour per application.

Respondents: Manufacturers of concrete masonry units.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 50.

The Department will add the Board member application form to the other information collections approved under OMB No. 0605-0028.

Evaluation and Compliance

Estimate of Burden: 1 hour per quarter.

Respondents: Manufacturers of concrete masonry units.

Estimated Number of Respondents: 690.

Estimated Number of Responses per Respondent: 4 per year.

Estimated Total Annual Burden on Respondents: 2760 hours.

The Department will add the Board member application form to the other information collections approved under OMB No. 0605-0028.

National Environmental Policy Act

This final rule will not significantly affect the quality of the human environment.

Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

Public Comments and Department Responses

The Department published a proposed rule setting forth the draft order in the Federal Register on August 25, 2020 (85 FR 52059). The Department made available copies of the proposed rule through the Office of the Federal Register also via the Internet at www.regulations.gov. That proposed rule provided for a 45-day comment period. The Department received comments from 146 commenters, including four commenters that submitted during the public comment period for the referendum procedures. This document sets forth the comments the Department received on the Order and the Department's responses.

Where appropriate, similar comments were aggregated together. The comments are set forth according to the subject of the comment.

The Initial Regulatory Flexibility Act (IRFA) report and the Department's economic analysis

The Department requested comments on the IRFA report. For ease of reading, this section addresses those comments that were specific to the IRFA and the Department's economic analysis of the industry. Some of the comments received on these subjects are later reinforced by the comments received regarding the Order. This may result in a perception of repetition; however, any such repetition simply will reinforce the Department's goal to address all comments received. The Department will refer back to this section where subject matter overlaps. With regards to IRFA and the economic analysis of the industry, the Department requested comments regarding:

1. Information about concrete masonry unit production, including:
 - a. Estimated annual production of concrete masonry units for the industry as a whole and by business size;
 - b. The number and size of entities covered under the proposed order, including whether production occurs among businesses not classified under NAICS industry 327331; and
 - c. An estimated sales price for concrete masonry units.
2. Whether to include a de minimis exemption and what criteria to use for an exemption; and
3. The approach used to estimate the impact of the proposed order on industry and small businesses and suggestions for alternative approaches.

Comment:

One commenter provided the following information on annual production numbers:

“The National Concrete Masonry Association (NCMA) conducts an annual sales survey of the industry. The latest survey was completed in 2019 and includes information on annual production for the calendar year 2018. Based on that survey, it is estimated that 1.15 billion concrete masonry units were produced in the United States in 2018.”

Response:

The Department referenced this NCMA information in its economic analysis of the industry.

Comment:

Additionally, the commenter provided NCMA “estimates that there are 284 concrete masonry unit manufacturing companies which operate a combined 627 plant locations. (Reference: NCMA 2019 CMU Sales Survey). These companies operate an estimated 2000 machine cavities. . . . [The NCMA] estimates that the median number of machine cavities per concrete masonry unit manufacturing company in the U.S. is 3, and the average number of machine cavities per company is 6. While the smallest companies will have one machine at one location with 2 or 3 machine cavities, the largest companies have multiple plant locations in multiple regions of the country and more than 100 cavities.” Based on this, the commenter recommends determining company size based on production capacity (preferred) or number of production locations. The commenter then provided proposed categories.

Response:

As mentioned previously, to ensure the fair, equitable, and diverse representation of the concrete masonry products industry, the composition of the Board will reflect the geographical distribution of the manufacture of concrete masonry products in the United States, the types of

concrete masonry products manufactured, and the range in size of manufacturers in the United States. Since the Concrete Masonry Products Board should reflect the distribution of both size of company and types of products produced, the Department does not believe a reliance on concrete masonry unit manufacturing capacity is the correct focus. Further, the machines in operation can be dual purpose (i.e. molds between concrete masonry units and non-concrete masonry units on the same machine can be interchangeable) and therefore a focus on concrete masonry unit capacity to determine company size could be problematic and not be an accurate reflection on company size.

As to using the number of production locations as a basis for Board membership, the Department does see this as a logical alternative but at this time the Department does not have the data needed to verify the number of production locations.

The Department considered these options along with number of employees as a measurement and has decided to use number of employees to determine company size. Using the number of employees as a measurement is consistent with practices of the U.S. Small Business Administration (SBA) and the County Business Patterns (CBP) data collected by the Bureau of the Census on behalf of the SBA. The SBA uses the number of employees to categorize company size. The survey of local businesses provides information on the number employees, better reflects the entire production of concrete masonry products, and is the most reliable information currently available. CBP is an annual series that provides subnational economic data by industry and has been in existence since 1946. Data reported are for activities occurring during the reference year. CBP has been published annually since 1964; similar data were reported for various periods since 1946. The Department believes this information is the best available to make an accurate count.

If the industry approves the Order, the Board will be able to conduct additional surveys that will help better characterize the industry. Until such time as the Department can obtain additional needed reliable data, the Department will use SBA and CBP data.

Therefore, the Department will define company size based on the number of employees. Companies identified as “large” will be those with over 500 employees; companies identified as “medium” will be those with between 100-499 employees; companies identified as small will be those with less than 100 employees. See the general comment section under the same heading for additional details on the Department’s definition of company size categories.

Comment:

The Department received comments from seventeen commenters all opposed to having a de minimis exception. Two commenters did not endorse the use of a de minimis exception but suggested that the Department not use number of employees as the criteria if the Department decides to include a de minimis exception.

Response:

After careful consideration, not receiving any comments supporting the inclusion of a *de minimis* exception and recognizing the lack of complete knowledge of the industry composition, the Department has decided not to include a *de minimis* exception. The Department leaves open the possibility to include a *de minimis* exception after a period of time to allow some experience of the Order in operation and gain a better understanding of the affected industry. Until that possible re-consideration, there is no *de minimis* exception and all manufactures of concrete masonry units will be subject to the assessment should the Order go into effect. See the general

comment section under the same heading for additional details on the Department's consideration of the *de minimis* exception.

Comment:

With regard to the economic analysis and the table [Table 3] presented, one commenter pointed out an apparent inaccuracy in the total employment number of 6,344 data.

Response:

The Department recognizes the table can cause confusion. The Department provided a footnote and hyperlink (from the Census Bureau (<https://www.census.gov/programs-surveys/susb/about/glossary.html>) that provides an additional explanation of the information in the table. The following reproduces the information associated with the hyperlink:

Enterprise: An enterprise (or "company") is a business organization consisting of one or more domestic establishments that were specified under common ownership or control. The enterprise and the establishment are the same for single-establishment firms. Each multi-establishment company forms one enterprise - the enterprise employment and annual payroll are summed from the associated establishments.

Enterprise Size: Enterprise size designations are determined by the summed employment of all associated establishments. Employer enterprises with zero employees are enterprises for which no associated establishments reported paid employees in the mid-March pay period but paid employees at some time during the year.

Firm: A firm is a business organization consisting of one or more domestic establishments in the same geographic area and industry that were specified under common ownership or control. The firm and the establishment are the same for single-establishment firms. For each multi-establishment firm, establishments in the same industry within a geographic area will be counted as one firm; the firm employment and annual payroll are summed from the associated establishments.

In reading the table remember one company can have multiple firms. Therefore, of the 430 firms noted in the table, 401 firms or 93 percent came from companies employing fewer than 500 employees. And these 401 firms accounted for 514 establishments, or 75 percent of all establishments, and about 62 percent of the employment across the industry. The Department has amended the IRFA to make the point clear that a company or business can be made up of multiple firms.

Paperwork Reduction Act

In the proposed rule, the Department invited comments on the information collection requirements (ICR) prescribed in the Paperwork Reduction Act section of this rule. Specifically, the Department solicited comments on: (a) Whether these ICRs are necessary for the proper performance of the functions of the Department, including whether the information has practical utility; (b) the accuracy of the Department's estimates of the burden of the ICRs; (c) the quality, utility, and clarity of the information to be collected; and (d) whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Comment:

The Department received one comment regarding the information collection. The commenter concurred with the time and burden estimate for completing the individual forms. However, the commenter believed the Department overestimated the total annual burden of completing the evaluation and compliance form. The commenter suggested companies vice establishments for the form and believed the number of companies to be approximately 286.

Response:

The Department used 690 establishments in its estimates. Currently information on the number of manufacturers in this industry is not complete. Until such time as the Department has better information on companies, firms, and establishments within this industry and how the

industry will respond to reporting requirements, the Department chooses to err on the side of overestimating and will use the number of establishments (690) in its annual burden estimate of the number of respondents.

Concrete Masonry Units and Concrete Masonry Products

Comment:

One commenter opined that the only product that should be listed in the definition of concrete masonry units is gray block.

Response:

The Department provided a list of the products it considers qualify as a concrete masonry unit. The list reflects those concrete masonry products that fall within the definition of concrete masonry unit - a concrete masonry product that is manmade masonry unit having an actual width of 3 inches or greater and manufactured from dry-cast using a block machine. Such term includes concrete block and related concrete units used in masonry applications – a more expansive category than only gray block. As there were no other comments in opposition, the Department will use this non-exhaustive list of examples to identify those products that qualify as a concrete masonry unit.

Comment:

*One commenter pointed out that use of “or” vice “and” in the definition of “masonry unit” opens to assessments products not contemplated to be subject to assessment. The wording in the Act is “. . . noncombustible building product laid by hand **or** joined using mortar, grout, surface bonding, post-tensioning or some combination of these methods.” On the same subject, one commenter asked the Department to refine the definition of masonry unit or give notice to include concrete pavers and segmental retaining wall units as being subject to assessment.*

Response:

The commenter attempts to show an apparent inconsistency within the Act. However, the Department reads this definition differently and finds the term “or” combines two thoughts, both of which require joining the concrete masonry units with a bonding agent. While both readings may be grammatically correct, the other definitions the Act provides supports the Department’s reading of this definition.

In its definition of concrete masonry products, the Act refers to a broader class of products that would include concrete masonry units as well as hardscape products such as concrete pavers and segmental retaining wall units. In its definition of concrete masonry products, the Act makes clear that hardscape products (concrete pavers and segmental retaining wall units) are a concrete masonry product distinct from concrete masonry units. Further, the Act defines as unique terms “concrete masonry unit” and “masonry unit.” Concrete masonry unit is a subset of masonry units. The Act defines masonry unit as a noncombustible building product intended to be laid by hand or joined using mortar, grout, surface bonding, post-tensioning or some combination of these methods.

In its American Standard Building Code Requirements for Masonry the National Institute of Standards and Technology (NIST) certainly captures within its definition of masonry a “bonding together.” Naturally a masonry unit would contemplate a bonding together of units. The definitions provided by the Act also supports the conclusion that a masonry unit suggests a bonding together. Those products laid by hand without a bonding agent are the hardscape products that the definition of concrete masonry products distinguishes as outside of concrete masonry units.

Therefore, the Department finds that the word “or” combines the following two thoughts:

. . . building product intended to be laid by hand using mortar, grout, surface bonding, post tensions or some combination of these methods, *or*

. . . building product intended to be joined using mortar, grout, surface bonding, post tensions or some combination of these methods.

Although the wording and sentence structure is admittedly somewhat confusing, the interpretation above aligns with the other definitions, NIST standards for masonry which are accepted nation-wide and internationally, and the intent of the Act to assess concrete masonry units and not the broader class of products that includes pavers and segmental retaining walls. As stated previously, hardscape products such as pavers and segmental retaining wall units are not concrete masonry units and therefore are not subject to assessment under this order.

Comments in full support of the proposed Order

Comment:

Thirty commenters communicated support of the proposed Order, without specifying particular attributes. Most spoke enthusiastically about the prospect of having funding available to conduct research, education, and promotion programs.

Comment:

53 commenters highlighted that the program will increase sales and job growth. Many commenters noted that the softwood lumber building industry has successfully implemented its own Checkoff program. The commenters viewed a Checkoff program as a vital initiative and one that will help them better compete in the building products market.

Comment:

45 commenters espoused the resiliency of concrete masonry units as a construction material, specifically calling attention to its resistance to extreme weather and wind conditions, its durability against natural disasters and earthquakes, fire safety features, and generally safer structures. Commenters believed if a checkoff program is implemented, a priority should be given to conducting an information campaign that highlights these attributes.

Comment:

28 commenters identified regional training and workforce development as priorities for future growth. The commenters envisioned a more robust training program at both the university level and trade schools. Commenters believed Many universities have dropped the building trades from their curriculum. Commenters had a stated desire to reverse this trend. One commenter felt the program could promote wider use of software programs and other tools in the engineering and construction design of structures.

Comment:

26 commenters supported engaging in a messaging campaign targeting designers, architects, engineers in an effort to impact local building codes in favor of concrete masonry as the building product of choice.

Comment:

Ten commenters voiced a desire to fund research to determine the true environmental impact of concrete masonry units, believing such research will show that over their life, concrete masonry units reduce the carbon emissions (especially when offset by carbon recovery) and have a low environmental impact as compared to other building materials. In addition, commenters believed there were manufacturing aspects to explore that will further reduce the carbon footprint of concrete masonry units.

Response:

The Department appreciates all public comments both in support or opposed to the Order and finds them all very constructive. The Department remains committed to its neutral position as to the ultimate outcome of the referendum. By publishing all comments, the Department continues its full support of the industry as a whole and the decision the industry ultimately chooses.

Comments against or reflecting a desire for changes

Regional and State-based checkoff programs

Comment:

Fourteen commenters, primarily from concrete masonry unit producers in the State of Florida, supported a voluntary, State-based checkoff program in lieu of a national, mandatory program. Several commenters noted “the State of Florida has had a voluntary program in operation for a number of years.” Several reinforced the thought of one commenter that “the State program has been effective in serving local concrete masonry units (CMU) initiatives and need” and that “Florida CMU companies view the Proposed Order as another “TAX” on Florida companies.” Another commenter stated that “manufacturers should not be compelled to participate or contribute to any program, let alone one that seems to have been conceived without full regard for the state and nature of their individual businesses or markets, or one that has not clear direction, strategy or philosophy.” Another commenter succinctly provided that “I now conclude that I don’t think a national Check Off program is right for my industry. Instead, the program should be at the state level, which will be far more efficient and effective at addressing local and regional interests.” In opposition to a voluntary program, another

commenter observed that “as we’ve seen over time that it is kind of the 80-20 rule. 80% of the companies watch as 20% of the companies consistently contribute. Our industry needs 100% participation”.

Response:

While nothing prevents the industry from creating a “voluntary” checkoff program, the Act does not authorize the Department to establish a “voluntary” checkoff program.

The Act authorizes the Department to establish a “checkoff” program under a National Board that will collect an established assessment. The “checkoff” program is for research, education, and promotion, including funds for marketing and market research activities, that promote the use of concrete masonry products in construction and building. Government checkoff programs facilitate cooperation within industries dominated by relatively small producers that produce a commodity that is not easily differentiated by manufacturer. Typically, manufacturers acting alone do not have the resources to efficiently market the value of the product or conduct the research and education to promote market growth. Government checkoff programs facilitate cooperation within an industry and allow for a comprehensive, industry-wide strategy to expand markets.

One purpose of a nationwide checkoff is to promote a commodity as a whole, instead of by individual businesses, meaning participants in the industry benefit from economies of scale in conducting research, education, and promotion for the entire industry. The goal of a checkoff program is to enhance consumer awareness nationwide which may lead to increased sales and higher overall demand for masonry products.

Another purpose of Government involvement in checkoff is to enforce the remittance of assessments by the manufacturer to the Board. If the Order goes into effect, the payment of assessments will be mandatory. The Act and Order provide “. . . that assessments shall be paid by a manufacturer if the manufacturer has manufactured concrete masonry products during a period of a least 180 days prior to the date of the assessment is to be remitted.” 15 U.S.C. 8705(a).

However, the Order is not automatic but rather is subject to a vote among the affected industry. The Order will only go into effect if approved by a majority of manufacturers that participate in the referendum and if they also represent a majority of the machine cavities in operation.

Comment:

Three commenters suggested exempting Florida from the national program and twelve suggested making Florida its own region. Another commenter suggested including a sixth region by removing Florida from Region 2 and making it its own region. Two commenters suggested simply providing an opt-out option for segments of the industry or individual manufacturers.

Similarly, regarding region makeup, one commenter stated “the Order does not explain how funds might be used to support smaller districts within a geographic region. For example, Region V includes Alaska, California, Colorado, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. This region spans over 3,000 miles from east to west and over 2,000 miles north to south. It is naive to assert that the same programs and projects will support the varying needs of Hawaii, Alaska, California, and Idaho.” Another commenter voiced a specific concern of “the unique climate and geographic isolation of states” such as

Hawaii and Alaska. And another commenter voiced concern that “while 50% of the money is to go back to the region it was collected, I feel it could be difficult to develop programs that would benefit the regions as a whole. Individual markets within the regions could be vastly different and therefore different programs could be needed for each individual market.”

Response:

With regard to designating the geographic regions, the Order uses the same language as is found in the Act and Florida is within Region 2. Anticipating the potential need to better reflect the industry needs or adapt to changes in manufacturing, the Act and the Order specifically provide a method for adjustment of geographic regions. While there is no provision to change the number of regions, upon a recommendation of the Board, the Secretary may modify the composition of the geographic regions described in the Act. So, in the future, the composition of the five geographic regions may change based on findings and recommendations of the Board. There is no restriction as to when the Board can do this. The Department has amended the Order to better reflect the freedom of the Board to recommend adjustments to the geographic regions established in the Act.

Although not required in the Act, the order then subdivides the five regions into 15 districts. Dividing the regions into districts will assist in adequately reflecting the geographic regional diversity of the Board and it will allow the Board to more easily manage the program, for example use of the district structure will assist in making sure allocation of funding is equally dispersed within a region, it will allow consideration of programs to be more specialized, it will better address the more localized, disparate, and unique characteristics found within a given region, and it will enable the Board to tailor programs to meet more localized

needs. Additionally, the district structure is readily adaptable as the Board may at any time recommend adjustments to the number, composition, and structure within the regions.

As stated previously, if the industry votes the Order into effect, the payment of assessments will be mandatory. Allowing for an opt-out option would be counter-productive and defeat the purpose of the Act.

De minimis exception

Comment:

Seventeen commenters voiced opposition to the consideration of including a de minimis exception.

Response:

The Department recognizes that some small businesses with minimal production in the industry may not have the resources to comply with the requirements imposed by the proposed order, and therefore, the Department requested comments on whether the Department should consider a *de minimis* exception for these small businesses. A *de minimis* exception would exclude from the order some small businesses with minimal production, based on measures of unit production, employment, receipts, machine cavities, or other relevant criteria.

Of particular note, of those commenting on the potential exception, eleven stated they were a small business and believed it only fair to be included in assessments as they would also reap the benefits of research, education, and promotion programs the checkoff program puts into effect.

As previously stated in the section concerning FRFA, after careful consideration, not receiving any comments supporting the inclusion of a *de minimis* exception, the Department has decided not to include a *de minimis* exception. The Department leaves open the possibility to reconsider the application of a *de minimis* exception based on observations following the execution of the Order, the input of the Board, and lessons learned after implementation of the program. Until that re-consideration, there is no *de minimis* exception and all manufacturers of concrete masonry units will be subject to the assessment should the Order go into effect.

Company size

Comment:

The Department requested comments on the proper determinant for company size. Two commenters suggested that production capacity or revenue would be a better method to determine if a company is categorized as small, medium or large. One commenter mentioned that recent trends of automation in concrete block manufacturing have resulted in the use of fewer employees while increasing manufacturing output. One commenter thought that considering manufacturing capacity rather than number of employees is a more practical measure of size.

Response:

The Act sets out the criteria to ensure diverse representation of the industry in selecting Board members. The Secretary will add these criteria into her plan for proper Board composition, the Department will follow this plan to help attain a diverse representation of members for the Board selection process. One criterion prescribed by the Act is that Board members reflect the “range in size of manufacturers in the United States.”

As previously stated in the section concerning the IRFA, the Department used the company size information based on the SBA table of company size standards. Like the SBA, the Department used 500 as the employee number between small and large. To create a range in size, the Department broke size down as small, medium, and large. To determine the number for each category the Department used Census data (2017 County Business Patterns and 2017 Economic Census). The Department used Table 3 to ascertain firm size and distinguish between those of “medium (20-499 employees)” and “small (0-19 employees).” Although SBA would define the latter two categories as small, the Department used Census categories and did not refine the size of business beyond that reflected in the Census provided data.

The numbers the Department used provide a satisfactory distribution between size of firms based on available Census data – resulting in approximately 35% of the firms that are small sized, approximately 40% of the firms that are medium-sized, and approximately 25% that are large-sized. The Department believes these percentages provide the needed balance and diversity of perspective for Board representation purposes.

If the requisite information becomes available, for instance through the evaluation and compliance process, to make a more refined distinction - whether based on production capacity or further refining company size - the Department will consider any such recommendation made by the Board.

Funding for regional initiatives

Comment

Five commenters spoke on the subject of the assessments received by the Board.

Commenters stated the proposed Order provides a return of 50% of assessments to each of the

five regions. The allocation of the remaining 50% would be decided by the Concrete Masonry Products Board. Commenters voiced concern that “the allocation of these Concrete Board held funds will not be fair and equitable and may benefit one or more regions at the expense of other regions.” One commenter thought the disbursement of funds “defective because there were no assurances that any funds from our market would work its way back to our state” One commenter was worried the size and geographic distribution of its region would preclude it receiving funds stating “[w]e would gladly support and vote for the check-off program if we were confident that at least some of the funds from this program would be used to bolster our individualized market.” One commenter stated the Order does not “clarify how it proposes to ensure that assessment funds would go to support geographic regions and apply equally throughout those regions.” One commenter views Florida concrete masonry unit manufacturers as “contributing much more than the return they will ever receive. This is a bad deal for us, period.”

Response:

The Order uses the same language as is found in the Act. Specifically, the Act stipulates that “[t]he order shall provide that not less than 50 percent of the assessments (less administration expenses) paid by a manufacturer shall be used to support research, education, and promotion programs and projects in support of the geographic region of the manufacturer.” 15 U.S.C. 8705(f)(1).

The Act (and the Order) provide fairness by stipulating that at least 50 percent of assessments collected from a region be used to support that region. The Board will base the return for regional initiatives on assessments collected from a given region. Since the return directly relates to the assessments collected from a region, it will not affect the benefit received

by other regions. Assessments collected and subsequent regional support remain proportional to the collected assessment funds. A region receiving more support than another also paid a higher amount and therefore contributes more to the national program, for the benefit of all.

Remember, the 50 percent requirement is a minimum, the Board has the authority to provide a higher percentage back to all the regions. By allocating at least 50% back to the regions, the order ensures some investment will be earmarked to go back to the region while leaving enough to fund national research, education, and promotion initiatives.

The Board will establish procedures for making certain that they are returning the appropriate amounts to each region. While the formal process of receiving and distributing assessments has not yet been established, the Order provides that within 180 days of their initial meeting, the Board will provide for review and approval by the Secretary a proposed evaluation and compliance program and its plan to verify compliance with the Act. The evaluation and compliance program will provide the method and metrics to use to help determine program effectiveness and will outline the way the Board will receive assessments, how to verify compliance, the best method to track sales, and how to document all actions.

The Department has added a stated requirement for the Board to include in the evaluation and compliance program the process by which the Board will meet statutorily-mandated disbursement of collected assessments.

Comment:

A commenter voiced the opinion that it would be “a far more efficient expenditure of a business' hard-earned money to let them invest 100% of that money in their own regional and

local trade associations, of which there are many.” Commenting on the overall program and amount coming back to each region, another commenter thought “[t]hat [it] is not a good investment.”

Response:

The Department does not make any conclusions on the efficacies of a checkoff program or the worthiness of the various choices an entrepreneur may have to use its business profits. The Order provides a method by which manufacturers may use pooled resources to further industrywide initiatives and better coordinate amongst themselves. The implementation of this Order relies entirely on an affirmative vote by the industry in a referendum. Certainly, a negative vote would provide the ability to invest 100% of their money allocated for these types of endeavors toward regional and local trade associations. A positive vote does not preclude a company from continuing to invest in regional and local trade associations but would add to it a program that is national and more expansive than those that are regional and local. It is an investment decision left entirely to the industry.

Board composition and process

Comment:

Thirteen commenters expressed a negative view of the Board composition. Two commenters wanted to ensure equitable representation on the state level. Two commenters shared the view that the number of board members per region should be based on other factors such as number of CMU producers or sales volume per region. Two commenters voiced a

concern about a Board member's qualifications to represent the industry and one commenter stated there is no guarantee that each region will have two representatives.

Response:

The Act proposes that the Board composition would consist of not fewer than 15 and not more than 25 members and provides the criteria to ensure diverse representation of the concrete masonry products industry on the Board. To ensure fair and equitable representation of the concrete masonry products industry and appropriate representative diversity as outlined in the Act, the composition of the Board “shall reflect the geographical distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States.” These criteria are the elements the Department will use to help create its plan for proper Board composition. The plan will assist in discerning a prospective member's qualifications to represent the industry. The Secretary's selection emphasis will be on attaining the goals for a diverse representation on the Board and will use the plan to help achieve these goals.

The Act stipulates five geographic regions and the States which make up each geographic region. The geographic regions found in the Order reflect Congressional judgment as to a fair balance and geographic distribution of manufacturers in the United States.

The Secretary will use this plan for proper Board composition during selection process to appoint Board members. Once the Order and Board are in place, the Act provides for changes in the states that make up a given region. Specifically, the Act instructs that the Board shall have the power and duty to recommend to the Secretary the reapportionment of the Board membership to reflect changes in the geographic distribution of the manufacture of concrete masonry

products, and the types of concrete masonry products manufactured. At a minimum the Board must conduct a review of the Board representation after three years and at the end of each three-year period thereafter. If the Board finds it warranted, the Board will provide to the Secretary for review and approval modifications to the geographic regions described in the Act and reflected in the proposed Order. *See* 15 U.S.C. 8705(f)(3).

So, while the number of regions will remain static at five, the Board has the power and duty to recommend to the Secretary modifications to the Geographic regions in the future to reflect the geographical distribution of the manufacture of concrete masonry products and the types of concrete masonry products manufactured.

The three-year requirement is a minimum and applies to Board membership reflecting the distribution of producers from regions across the country – referred in the Act as reapportionment. Recommendations to adjust the geographic regions has no such minimum and could be done at any time at the Board’s discretion. The Department has changed the Order to make explicit this distinction and additional discussion of the Board’s authority to modify the composition of geographic regions.

Comment:

Two commenters thought that the Board is not representative of the industry.

Response:

The Act specifically provides the manner in which the Department will ensure fair, equitable, and diverse representation of the concrete masonry products industry. Specifically,

“the composition of the Board shall reflect the geographical distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States.” As stated above, the Secretary will use these same criteria to form the plan or proper Board composition and then follow the plan to help achieve the goal of fair, equitable, and diverse Board representation of the concrete masonry products industry.

Comment:

On the subject of districts, one commenter thought the Department did not provide enough explanation as to why the proposed Order states only that the districts will "allow the Board to more easily manage the program." The commenter thought this summary justification "is very thin."

Response:

Although not required in the Act, the Order subdivides the five geographic regions into 15 districts. As mentioned previously, some examples of how district structure will allow the Board to more easily manage the program include: use of the district structure will assist in making sure allocation of funding is equally dispersed within a region, it will allow consideration of programs to be more specialized and better address the more localized, disparate, and unique characteristics found within a given region, and it will enable the Board to tailor programs to meet more localized needs. Additionally, the district structure is readily adaptable as the Board may at any time recommend adjustments to the number, composition, and structure within the regions. The Department has added further explanation on the functional purpose of districts to the Order.

Comment:

One commenter felt that with "States assigned their own district by the Proposed Order, it is highly likely that such states will use their Board representation to ensure the programs and projects favor their state, as they receive the same representation as a district consisting of as many as six other states."

Response:

The Act sets out the criteria to ensure diverse representation of the industry in selecting Board members. The Department will adopt these criteria into the plan for proper Board composition that it will use to help during the Board selection process. One of the criteria prescribed by the Act is that Board members reflect the "geographic distribution of the manufacture of concrete masonry products in the United States." The Act establishes the geographic regions and the plan for proper Board composition will reflect these regions. To help ensure equitable regional distribution and for ease of Board management of the program, the Order further breaks down the regions into districts (see above management discussion regarding districts). But keep in mind that, while the Secretary will strive to make appointments that include every district, the Secretary's primary focus will be on ensuring the regional diversity of Board representatives. District representation is a secondary criterion and not a statutorily mandated requirement. The Board, as representative of the entire industry, will base all its actions on a vote of all Board members, where each Board member would be entitled to one vote, and that a motion would carry if supported by one vote more than 50 percent of the total votes represented by the Board members participating. There is one exception, however, as the

Act requires that a two-thirds majority of the voting members of the Board is required to approve a change in the assessment rate.

Comment:

One commenter noted that while focusing its attention on geographic diversity, the Proposed Order (at § 1500.40(b)(2)) “would permit as much as 13% of the Board to come from a single company. A large company might well benefit from this provision and we believe it is unjust and detrimental to the industry to permit such overrepresentation on the Board.”

Response:

While the intent is unknown, the Act limits the maximum to two members from any single company or its affiliates that may serve on the Board at any one time. A possible reason is to ensure diversity of views by not letting a single company dominate the Board. But remember, it is a maximum of two and not a requirement of two and the Board can consist of a range of between 15 and 25 members.

As the commenter notes, this particular element reflects limits on Board composition and does not fall within the boundaries of the three-pronged selection criteria that will be a part of the Department’s plan to help ensure diversity of representation on the Board. So, if the Secretary appoints two members from a single company, that selection will automatically exclude from consideration additional candidates from that same company.

The distribution of appointments section of the Act, provides the criteria to use to ensure the composition of the Board reflects a diverse representation of the concrete masonry products

industry. Those criteria, and the elements the Department will use to help create its plan for proper composition of the Board, are “geographic distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States.” The Secretary’s selection emphasis will be on attaining the goals for a diverse Board representation with the requisite expertise and will use the plan to help achieve a Board that is representative of the industry.

Potential benefits of a Checkoff program

Comment:

One commenter recognized the merit for commercial contractors and architectural programs but noted that “the program provides no real value to the Do-It-Yourself consumer.”

Response:

The stated purpose of the Act and the Order is to strengthen the position of the concrete masonry products industry in the domestic marketplace; maintain, develop, and expand markets and uses for concrete masonry products in the domestic marketplace; and promote the use of concrete masonry products in construction and building.

The checkoff program facilitates industry-wide activity. Coordinated activity enables producers to leverage economies of scale in conducting research, education, and promotion of the industry and support the demand for concrete masonry products nationally. Oversight by the Secretary of Commerce would ensure that Board actions comply with the intended purposes of

the Act and that concrete product manufacturers share in program expenses as specified in the Act.

The assessments pay for programs that are intended to yield direct benefits to concrete product manufacturers in the form of new markets and increased consumer demand. Costs are expected to result in benefits to businesses that are at least commensurate with these costs. Additionally, research, education, and promotion programs could provide benefit to the general consumer and Do-It-Yourselfer with additional information in which to make an informed decision with regard to building materials.

Escrow Account

Comment:

The Proposed Order requires that 27% of assessments must be held in escrow for the first ten years after implementation. Fifteen commenters were opposed to this requirement and frequently cited to this as an example of government overreach. One commenter pointed to the apparent “unfair” treatment when compared to other checkoff programs. And another commenter thought the limitation on the Board” “to spending not more than 73% of income and that is before expenses. That is not a good investment.” Another commenter remarked that they did not find a single other checkoff program that levies this requirement on assessments in this manner.

Response:

The commenters are correct; thus far the requirement to establish an escrow account of this magnitude only exists in this Act. The Order uses the same language as is found in the Act, specifically the Board may not obligate an amount greater than 73 percent of that collected in fiscal years 1-8 and 62 percent of that collected in fiscal years 9 and 10.

The Department has been very diligent in following the Act and does so here. However, as a way or explanation for the apparent uniqueness of this section appearing in this Act, the Department offers the following. At the recommendation of the Congressional Budget Office (CBO), Congress included this section to remain compliant with the statutory Pay-As-You-Go Act of 2010 (*See* 2 U.S.C. 931). The Department published with the Order supporting documents on Regs.gov (see <https://www.regulations.gov/document?D=DOC-2020-0002-0004>). The Department included as a supporting document, the CBO report in its entirety. All programs going into effect after 2010 are subject to compliance with the Pay-As-You-Go Act of 2010 . Therefore, the Concrete Masonry Products Research, Education, and Promotion Act of 2018 would be subject to the Pay-As-You-Go Act. By way of a counter example, all current agricultural checkoff programs are under a statute that predates the Pay-As-You-Go Act. The Pay-As-You Go Act establishes budget-reporting and enforcement procedures for statutes affecting direct spending or revenues of the Federal government. The Concrete Masonry Products Research, Education, and Promotion actualizes these requirements using an escrow account as outlined in 15 USC 8715, Limitations on obligation of funds.

The Act defines the covered period for the limitations as that period that begins on October 5, 2018, and ends on the last day of the 11th fiscal year that begins on or after such date (i.e. end of fiscal year 2029 or September 30, 2030). After the covered period, the Board may withdraw and obligate in any fiscal year an amount in the escrow account that does not exceed 1/5 of the amount in the escrow account on the last day of the covered period. The Department

has revised the Order to better reflect the 62 percent limitation in fiscal years 9 and 10 and the final 11th year that ends September 30, 2030, as stipulated in the Act.

Government authority to implement a checkoff program

Comment:

Four commenters thought the proposed Order was too vague in defining the limits of government authority and fourteen commenters believe the Order was an example of Government intrusion. The comments expressed a concern that the proposed Order provides more government oversight, more overhead, unchecked authority to intrude and scrutinize company operations, another government entity involved in a privately-owned producer's daily operation, and of just another chance for the government to get their hands on more of our hard-earned dollars. One commenter summarized the view – “when was the last time we have looked at a government program and thought that is how I would want my business to be run. These programs usually start out with the best of intentions and then spiral out of control.” Another commenter thought there should be a vote after a one or two years to determine whether to continue the program.

Response:

The Act and Order confine the Secretary's authority to the subject matter of the Act, specifically 15 U.S.C 8701-8717. The Secretary does not exercise any authority or control outside the bounds of the Act.

The Board, the composition of which is representative of the industry, will administer the order and receive assessments. It is the Board that carries out the programs and projects of research, education, and pays the costs of such programs and projects. The Department does not have access to the program funds and the exercise of its authority is limited to ensuring the Board and industry properly carry out the provisions of the Act and Order.

The Department's role with respect to individual companies is in the form of as-needed evaluation and compliance. Evaluation, as noted by several commenters, will help ascertain the effectiveness of the program. The Act requires several studies and reports on the subject of program effectiveness. These reports (at proscribed intervals of annual, biennial, three-year, and five-year) will be available for public review and will provide several opportunities for those affected by the program to discern whether the proposed benefits have met expectations. With regard to compliance, the mandatory nature of the Act requires the Department to enforce the payment of assessments as prescribed by the Order and carried out by the Board.

Additionally, the Act and Order provide a mechanism to conduct a "sunset" referendum at five-year intervals to determine whether to continue the program. These potential "sunset" referenda are triggered at the request of at least 25 percent of the affected industry (those eligible to vote).

Comment:

One commenter thought the Order calls for what seems to be an intrusion into the affairs of private business. Another commenter voiced concern that the "Order allows for the audit and inspection of the financial records of manufacturers. It also requires that these records be retained for at least 7 years." Another commenter thought it would impact competitive bidding

from vendors. Another commenter was concerned there were no assurances of 3rd party auditing of a company's books

Response:

To provide the Secretary with needed authority to ensure compliance with the Order, the Act provides the Secretary the authority to require manufacturers to retain sufficient records to ensure compliance with the order and authorizes the Secretary to inspect those records the Act requires companies to maintain. Without this authority, the Secretary would have no ability to enforce the requirements of the Act and its Order. The requirement to retain records and allow for the Secretary to inspect such records does not equate to making a company's financial records available for public scrutiny and does not create the opportunity for vendors to use the information to its benefit in bidding. The seven-year requirement found in the order reflects the generally-recommended retention time for business records. Lastly, the Act requires all manufacturers covered by the order to make records available for inspection, that inspection will only be by an agent or employee of the Board or Department and not a third party.

Program evaluation

Comment:

Three commenters voiced a concern that the Order lacked adequate measures of success or effectiveness.

Response

Evaluation and effectiveness are very important to the Department and reviewing this order to make sure it achieves the Act's purpose is foremost. Within 180 days of the first Board meeting, the Secretary requires the Board to provide for approval an evaluation and compliance program that the Board will follow. This program will include the method and metrics the Board will use to help determine program effectiveness. Further, the Department has added a section to the Order that requires the Board to establish annual research, education, and promotion objectives and performance metrics for each fiscal year subject to approval by the Secretary. This same requirement appears in the Act at 15 U.S.C 8704(i). Objectives and performance metrics should consider and reflect those listed in 15 U.S.C 8716. The Board will make all objectives and metrics available for public review.

In addition to these added requirements, there are several reports that will study the success and effectiveness of this checkoff program. The Act requires the Secretary to prepare a study and submit to Congress a report examining the appropriateness and effectiveness of applying the commodity checkoff program model to a nonagricultural industry, taking into account the program established by this chapter and any other checkoff program involving a nonagricultural industry (see 18 U.S.C 8717).

Further, the Secretary requires the Board to fund an independent evaluation of the effectiveness of the Order and other programs conducted by the Board after five years and every three years thereafter.

Lastly, the Order requires the Board to prepare and make publicly available comprehensive and detailed reports that identify and describe all programs and projects undertaken by the Board during the previous two years, those planned in the subsequent two years, and detail the allocation of Board resources for each such program or project.

To ensure full transparency of Board operations, reports also will include the overall financial condition of the Board, a summary of the amounts obligated or expended during the two preceding fiscal years, and a description of the extent to which the objectives of the Board were met according to the established annual objectives and performance metrics. The table below provides a quick overview of the reports the Board and Department will produce to ensure transparency of the checkoff program and its operations.

Table 4. Table of reports that provide transparency of program operations

Report	Originator	Submit to	Initial	Frequency
Evaluation and Compliance	Board	DOC	1-year	Annual
Annual Budget	Board	DOC	1-year	Annual
Audit of Board books and records	Board	DOC	1-year	Annual
Program and resources (2-year forward and back)	Board	DOC	2-year	Every 2 years
Appropriateness of a non-agricultural commodity checkoff program	Board and Department	GAO	3-year	One time require
Evaluation of Board programs	Board, Independent reviewer	DOC	5-year	Every 3 years thereafter

Purpose of the Order

Comment:

The Act sets the initial assessment rate at one cent per concrete masonry unit sold. Three commenters stated concrete masonry product manufacturers not subject to the assessment should not be eligible to become Concrete Board Members “as a matter of fairness” and “to ensure that assessment funds are appropriately spent for the benefit of those manufacturers that are assessed,” i.e., the Board should not include manufacturers that do not pay assessments. Ten commenters suggested more broadly that the Department change the language throughout

the Order to reference concrete masonry units rather than concrete masonry products for similar reasons.

Response:

The Act is clear that Board membership is not to be limited to concrete masonry unit manufacturers (i.e. those subject to the assessment). Specifically, the Act provides that “[t]he Board shall consist of manufacturers,” 15 U.S.C. 8704(b)(1)(B)(iii); “manufacturers” is defined as “any person engaged in the manufacturing of commercial concrete masonry products in the United States.” 15 U.S.C. 8702(12). The Act further provides that “[t]o ensure fair and equitable representation of the concrete masonry products industry, the composition of the Board shall reflect the geographical distribution of the manufacture of concrete masonry products in the United States, *the types of concrete masonry products manufactured*, and the range in size of manufacturers in the United States.” 15 U.S.C. 8704(b)(2)(A) (emphasis added). Thus, the Act is unambiguous that all concrete masonry manufacturers are eligible for Board membership and not just concrete masonry unit manufacturers, and the Order reflects that statutory directive.

Beyond the specific statutory language with respect to Board eligibility, it is also clear that the overall goal of the Act is to promote and enhance the concrete masonry products industry as a whole, rather than simply one segment of it. Thus, while the assessment is levied against concrete masonry units sold (*see* 15 U.S.C. 8705(c)(1)), the purpose articulated in the Act itself is “to authorize the establishment of an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of research education, and promotion, including funds for marketing and market research activities, that is designed to --

- (1) Strengthen the position of *the concrete masonry products industry* in the domestic marketplace;

- (2) Maintain, develop, and expand markets and uses *for concrete masonry products* in the domestic marketplace; and
- (3) Promote the use of *concrete masonry products* in construction and building.”

15 U.S.C. 8701(a) (emphasis added). The references in the Order to the broader set of concrete masonry products rather than to the subset of concrete masonry units reflects the purposes set out in the Act.

Company ownership

Comment:

Two commenters stated an objection that the Proposed Order does not require U.S. company ownership to participate in the referendum and therefore allows foreign-owned businesses to participate.

Response:

The Act only applies to manufacturers engaged in the manufacturing of commercial concrete masonry products in the United States. All manufactures of concrete masonry products that physically manufacture in the United States are subject to the Act and those that manufacture concrete masonry units are subject to the assessment. The Act does not require U.S. ownership to be subject to the Act, nor does foreign ownership affect eligibility to participate in the referendum.

Secretarial appointments to the Board

Comment:

One commenter stated the proposed Order's authorization of independent Secretarial appointments violates the statute. Another commenter voiced a concern that "a Secretary might use political favoritism in selecting Board members and leaves the industry dependent upon the Secretary not to act in the Secretary's own interest." One commenter suggested the Board's dismissal process violates the statute. Two commenters voiced concern that "the Board serves at the pleasure of the Secretary." One commenter thought the proposed Order authorizing independent Secretarial appointments violates the statute because the commenter thought "the statute requires that the Secretary only make appointments from nominations by manufacturers."

Response:

The Act provides that the Secretary shall appoint Board members and leaves to the Secretary the manner in which the Secretary will establish an adequate pool of candidates. As an appointment, the Secretary must have sufficient latitude to select individuals of her choosing and not unduly be limited in her discretion in appointing the members of the Board. While it does not appear in the Act itself, when the President signed the legislation the President issued a statement, concurrent with the Act that provided:

“... the Act requires the Secretary of Commerce to appoint the members of the Concrete Masonry Products Board (Board), who would be inferior officers, from a list of nominees submitted by concrete masonry product manufacturers. It also provides that, if the Secretary fails to appoint someone from that list within a specified period, ‘the first nominee for such appointment shall be deemed appointed’ The Secretary’s failure to make a timely appointment from the list will result in the appointment of an inferior officer by a private party, which would violate the Appointments Clause. Furthermore, the requirement to appoint from a list of nominees, if the list is too limited, may unduly limit the Secretary’s

constitutional discretion in appointing the members of the Board. In those circumstances, my Administration will treat these requirements as advisory and non-binding.”

Therefore, in keeping with the President’s signing statement, to the extent selection criteria limits the Secretary’s noted discretion in making appointments, the Secretary will treat this limitation as advisory in nature. Hence, the Department will not include in the Order those provisions of the Act that are inconsistent with the Presidential signing statement including those related to “deemed” appointment of members and those that may unduly limit the Secretary’s discretion in making appointments. The Order as written reflects the Secretary’s discretion in making appointments.

To more closely align with the Act, the Department has added language to § 1500.41(c) of the final Order to make explicit the nomination process to fill members whose terms expire and to fill naturally occurring vacancies. Additionally, the Department will change the language in § 1500.44(a) of the final Order to better match that found in the Act and make clear “that if a member or alternate of the Board who was appointed as a manufacturer ceases to qualify as a manufacturer, such member or alternate shall be disqualified from serving on the Board.” Even in the case where a member ceases to qualify as a manufacturer, the power to remove the appointed Board member and fill the vacancy remains with the Secretary.

The Board does not have independent authority to remove one of its members. While the Board may make recommendations, the Secretary alone has the authority to remove a Board member. As an appointment all members serve at the pleasure of the Secretary and therefore the Secretary retains the prerogative to remove any Board member. Some examples of possible dismissal action include the Secretary making a determination that a member’s continued service would be to the detriment of fulfilling the purpose of the Order, which could include a member’s

failure or refusal to perform his or her duties properly or for engaging in acts of dishonesty or willful misconduct.

To reiterate, the Department is following the President's guidance and treating those requirements that may unduly limit the Secretary's discretion in making appointments as advisory in nature and not binding.

Finally, the Act provides that the Secretary may make appointments from nominations by manufacturers. As an inclusive but not exclusive clause, the Order aligns with this language and provides that the Secretary will consider nominations submitted and other manufacturers for appointment, as the Secretary may deem appropriate and will give consideration to recommendations of the Board, self-nominees, and more expansive input from sources available to the Secretary.

Comment:

One commenter thought that the proposed Order violates the Appointments Clause, as noted by the President in his signing statement. One commenter thought "the Department simply disregards the provisions in the Act that the President has deemed unconstitutional. However, neither the President nor the Secretary has such authority. If the President believes a law is unconstitutional, he can veto the law rather than sign it. However, it is the federal courts (and ultimately the United States Supreme Court), not the President, that are the arbiters of whether a law is constitutional. Therefore, the Secretary's reworking of the statute in the Proposed Order is simply illegal, and subject to reversal."

Response:

As mentioned previously with regard to the Appointments Clause of the Constitution, the President stated that “. . . in those circumstances, my Administration will treat these requirements as advisory and non-binding.” The Order as proposed, adheres to the President’s statement. Therefore, in keeping with and as directed by the President’s signing statement, to the extent selection criteria limits the Secretary’s noted discretion in making appointments, the Secretary will treat this limitation as advisory in nature.

Comment:

One commenter thought the proposed Order violates the statute.

Response:

With the exception of those elements that fall within purview of the President’s Statement and are therefore advisory in nature, the Order fully adheres to the Act.

Scope of the Act

Comment:

One commenter felt the limitation of personal liability of Board Members is not authorized by the statute.

Response:

The Secretary appoints members to the Board and under the Appointments Clause, the members of the Concrete Masonry Products Board (Board) would be inferior officers. As officers they cannot be held personally liable when they exercise their discretionary duties of their office, in good faith, while acting within the scope of their authority. The Department has edited the language of §1500.85 to better reflect the limitation on personal liability.

Comment:

One commenter stated the authorization of research, education and promotion exceeds the authority of the statute.

Response:

Whenever possible the order closely adheres to the language found in the statute. The title of the Act is the Concrete Masonry Products, Research, Education, and Promotion Act of 2018.

The Act's purpose is to authorize the establishment of an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of research, education, and promotion, including funds for marketing and market research activities, that is designed to—

- (1) strengthen the position of the concrete masonry products industry in the domestic marketplace;
- (2) maintain, develop, and expand markets and uses for concrete masonry products in the domestic marketplace; and
- (3) promote the use of concrete masonry products in construction and building.

In its review and writing of the Order, the Department was diligent and strident in its efforts to adhere to the stated purpose of the Act. The Department used this stated purpose to guide its decisions with regard to the Order, to remain within the authority granted by the Act, and to ensure close compliance with the Act.

Comment:

One commenter thought the proposed Order omits the statute's requirement of an independent auditor.

Response:

The Order stipulates in paragraph (p) of § 1500.47, Powers and Duties that the Board will cause its books to be audited by a certified public accountant. The Department has added language to make explicit the requirement for the Board, at the end of each fiscal year, to have the books and record of the Board audited by an independent auditor and submit to the Secretary a report of the audit.

Comment:

One commenter thought that the proposed Order exceeds authority granted by the statute with regard to complaints of violations. Specifically, “statute only gives the Board the responsibility to gather facts surrounding a complaint and to report any complaints of violations to the Secretary. The determination as to whether enforcement of the law is warranted is laid squarely at the feet of the Secretary, not the Board. To do otherwise [as the commenter interprets the proposed Order] would be to create stark conflicts of

interest in which Board members may be evaluating complaints against their own industry competitors.”

Response:

The power and authority to investigate resides with the Secretary. Specifically, as set forth in the Act, “[t]he Secretary may conduct such investigations as the Secretary considers necessary for the effective administration of this chapter, or to determine whether any person has engaged or is engaging in any act that constitutes a violation of this chapter or any order or regulation issued under this chapter.”(15 U.S.C. 8709(a)).

The Order uses language that makes explicit the limitations on the powers the Board has regarding complaints of violations. The Department concurs with the commenter that the Board’s powers and duties with regards to complaints is to receive the complaint, gather facts surrounding a complaint, and report any complaints of violation the Secretary. The Order’s use of the terms receive, evaluate, and report only was meant to convey just the powers and duties the commenter mentions. Use of the word evaluate was not meant to expand the Board’s authority. The Department has replaced the word “evaluate” with the word “investigate” as the commenter suggests.

Program budget

Comment:

One commenter stated “the [p]roposed Order allows the Board to obfuscate its precise expenditures.”

Response:

The Department believes the Order accurately reflects the Act and levies the statutorily mandated requirements for the Board to report on all of its expenditures (for a list see the table of reports that provide transparency in the response to comment under the heading of Program Evaluation). Specifically, the Board is to periodically prepare and make available to the public and manufacturers reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended. Further, the Order requires a) at the end of each fiscal year and at such other times as the Secretary may request, the conduct of an audit by an independent auditor and submission of a report of the audit directly to the Secretary. Additionally, the Order requires that the Board, every two years, shall prepare and make publicly available a comprehensive and detailed report that includes an identification and description of all programs and projects undertaken by the Board during the previous two years as well as those planned for the subsequent two years and detail the allocation or planned allocation of Board resources for each such program or project. Such report shall also include:

- (1) The overall financial condition of the Board;
- (2) A summary of the amounts obligated or expended during the two preceding fiscal years; and
- (3) A description of the extent to which the objectives of the Board were met according to the metrics required under § 1500.50(a)(1).

Comment:

One commenter thought the Order gives the Board too much independent power over its budget and expenses. The commenter stated that “the proposed Order treats the shifting of 10% of funds in a category to another category as de minimis. But 10% is far too high to be considered de minimis. In fact, in almost all contexts it is not only too large to be de minimis, it is considered material. This shift in funds merits consideration - the fact the proposed Order seeks to claim 10% as de minimis again demonstrates a consistent effort throughout the proposed Order to reduce the Board's accountability when it comes to properly managing its budget. Moreover, not only is this amount not de minimis, it subverts the Secretary's statutory authority to set the budget for the Board.”

Response:

The Department did not intend the use of the term “*de minimis*” to make a characterization or judgment as to the amount of money but rather was using the term in connection with the allowance of the Board to have some flexibility in managing its business operations. Simply meant as a good business practice, the Department is allowing the Board to make unanticipated adjustments to its approved annual programs. The ten percent provides the flexibility to allow the Board to make an adjustment between two approved categories, but the adjustment is specific to an annual budget, is confined to the current fiscal year, and is measured against the two approved categories being adjusted, i.e. it is not 10% of the total amount of all assessments received. Subsequent budgets would require adjustment and approval before the Board implements it beyond a given year. Therefore, an adjustment does not carry over from year-to-year but would require approval the next time the Board submits an annual budget for approval. The Department has removed from the Order the “*de minimis*” characterization of this allowed funding shift.

Language of the Act and the Order

Comment:

With regards to program budget, one commenter points out two apparent discrepancies in the language of the Order with that of the Act. In the Order the clause describing the Board's submission of its annual budget did not include the clause "the probable cost of each promotion, research, and information activity proposed to be developed or carried out by the Board." Further the commenter points out in the section outlining requirements of contracts the Order's use of the phrase "estimate the cost" while the Act uses the phrase "specify the cost."

Response:

First, the Department expects an annual budget submission to be of sufficient detail for the Department to evaluate all promotion, research, and education activities of the Board for an upcoming year. By its definition, an annual budget would include cost estimates to perform each activity. Second, the Department considers use of the phrase "estimate the cost" vice "specify the cost" as being more synonymous vice a notable distinction.

While the Department does not necessarily agree with the commenter's conclusions that these omissions would "reduce accountability and responsibility by the Board for the program," the Department agrees that, whenever possible, the Order will use the language of the Act. To maintain its close adherence to the Act, the Department has added to the final Order the missing clause and use the word "specify" versus "estimate."

Comment:

In the section describing the powers and duties of the Board, one commenter noted two discrepancies between the language used in the Act when compared to that used in the Order. The first is the missing word “generic” in the Order under the powers and duties of the Board. The Act provides a power and duty of the Board to "carry out a program of generic promotion, research, and education regarding concrete masonry products." Yet the Order does not include the term "generic." The commenter thought removing the term "generic" allows Board members to influence Board projects or programs to favor specific geographic areas or concrete masonry unit manufacturers within a region. This would undermine the spirit and purpose of the proposed Order, which purports to benefit the industry as a whole. The Second is the missing word “products” in the order also under the powers and duties of the Board. “The Act provides in the contracts and agreement section the Board may enter into contracts or agreements ‘to carry out generic research, education, and promotion programs and projects relating to concrete masonry products . . .’ Again, the language of the proposed Order drops a key word from the statute enacted by Congress and signed into law by the President. This time, the term it drops is ‘products.’ The Board is only authorized to enter into these agreements for purposes that relate to concrete masonry products, not concrete masonry generally.”

Response:

The Department acknowledges the omission of these words and this final rule reflects the correction to the referenced sections to include these terms. The Department has added the words “generic” and “products” in their respective places in the final Order.

Comment:

One commenter pointed out an apparent drafting error explaining that § 1500.60(e)(3) makes reference to a non-existing section. Equally important, the commenter points out that the order does not include in its annual budget (found in §1500.50), a requirement to discuss whether previous objectives were met.

Response:

The Department thanks all commenters for their diligent reading of the Order. Keep in mind the requirements listed for the annual budget in § 1500.50 are minimum requirements for the annual budget. The Secretary has the discretion to levy additional requirements for the Board to include in its annual budget and the Board as well, at its discretion can include additional information in its annual budget submission. The Department has fixed the noted drafting discrepancy and has included as another minimum requirement that the Board include in its annual budget a comparative analysis to the preceding year's programs, plans, and projects.

Board Membership

Comment:

One commenter asked “what a reasonable amount of time” would be for the Secretary to appoint a Board, could it be one or two years. And would assessments commence prior to a Board being in place.

Response:

Although the Act is silent as to how long the Secretary has to appoint initial Board members, if the referendum is successful the Department anticipates issuing a call for

nominations when it publishes the final results of the referendum. Barring a rescission, the effective date of the Order will be November 30. The length of time to review and select from a qualified pool of candidates would be measured in months vice years.

The Board will set the date of the receipt of assessments. The Board has the latitude but not the requirement to make assessments “retroactive” to the effective date of the Order. The Board is made up of representatives of the industry; their vote on when to begin receipt of assessments will equally be imposed upon the Board members as well.

Assessments

Comment:

One commenter thought the proposed Order “creates a retroactive tax.” Several commenters referenced that the Department is “levying a tax.” Another commenter stated, “it is essentially another tax on the products that we produce will ultimately result in the end user having to pay more for a product than they otherwise would in today’s market.”

Response:

There is no authority for the Department to enact a tax in either the Act or the Order. The Act sets out the assessment rate and that the assessment rate shall be \$.01 per concrete masonry unit sold. The Board will collect an assessment which the Act stipulates the Board must use to establish an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of research, education, and promotion, including funds for marketing and market research activities, that is designed to—

- (1) strengthen the position of the concrete masonry products industry in the domestic marketplace;
- (2) maintain, develop, and expand markets and uses for concrete masonry products in the domestic marketplace; and
- (3) promote the use of concrete masonry products in construction and building.

Whether or not a manufacturer chooses to pass along to customers the assessment paid is a business decision and not a government requirement.

Comment:

One commenter believed the Proposed Order exceeds the debt collection authority in the statute.

Response:

The Act establishes an assessment upon a manufacturer if the manufacturer has manufactured concrete masonry products during a period of at least 180 days prior to the date the manufacturer must remit the assessment to the Board. Further, the Act authorizes the Secretary to set the rate of and levy both a late payment as well as an interest charge on manufacturers that fail to timely remit their quarterly assessment. Since the authority would be without force if the Secretary could not otherwise enforce the assessment payment, the Secretary has the same remedies available to the Executive Branch. In fact, 15 USC 8708 (d) provides for additional remedies available to the Secretary. It specifically does not preclude the Secretary from availing of other remedies as appropriate for enforcing collection, to include to actions under Federal debt collection procedures.

Comment:

One commenter thought the proposed Order exceeded the statutory authority by permitting others to collect assessments.

Response:

The Act gives the Secretary broad discretion on the process of collecting assessments. The Act states that assessments required under the Order shall be remitted by the manufacturer to the Board in the manner prescribed by the Order and the Order shall provide that assessments required under the Order shall be remitted to the Board not less frequently than quarterly. While the formal process of receiving assessments has not yet been established the Order provides the requirement to propose an evaluation and compliance program. The evaluation and compliance program will include the manner in which the Board will receive assessments. The Board has the latitude to recommend to the Secretary an entity that will receive assessments on behalf of the Board.

Comment:

Four commenters requested clarification on the assessment rate of \$.01 per concrete masonry unit sold. One commenter sought clarification on whether “the period of applicability applied to when the first sale occurs and the assessment is paid, or if the period of applicability extends until the final sale when the end customer purchases a CMU. If it is the latter, it is possible that a CMU manufacturer could purchase a load of CMUs from another manufacturer, paying the assessment.” Another commenter wanted to know if the provision that outlines that

the “first” sale of a CMU is assessed, “includes those CMU’s sold amongst producers. Separating these sales will be administratively challenging. Required by the Act, manufacture[r]s are to identify the total amount due in assessments on ALL sales receipts, invoices, or other commercial documents of sale as a result of the sale of concrete masonry units. This can be problematic on certain projects or with certain customers that do not recognize fees in their payables systems and all costs are to be rolled up in the unit pricing. This has the potential to have the exact opposite effect and drive potential consumers of our products to other types of building materials that may be more affordable.” Another commenter stated there will only be an assessment on the first sale of concrete masonry units. “This seems counterintuitive to most taxes or assessments. Many times sales taxes are not collected on items bought for resale purposes, meaning that tax is collected on the final sale. It is common for CMU manufacturers to sell products to one another which are then sold in a final sale to the end customer.”

Response:

The Act sets the initial rate as the assessment rate on concrete masonry products shall be \$.01 per concrete masonry unit sold. The Order provides further guidance that manufacturers will base and record the assessment only on the first sale of a concrete masonry unit and specifically precludes subsequent sales of the already assessed concrete masonry unit.

Therefore, there will only be a single assessment, paid once, for each concrete masonry unit at its initial sale. The manufacturer of the concrete masonry unit pays the assessment for each block sold. The record of this initial sale is the one the Order requires. The Order requires the Board, within 180 days of their initial meeting, to provide a proposed evaluation and compliance program for review and approval by the Secretary. The Department expects this evaluation and compliance program will reflect the business operations of the industry, will fully explain the

procedures of assessment payment, and the specific documentation manufacturers will need to meet recording requirements.

Comment:

One commenter stated the assessment, as written, would be levied against paver and retaining wall block manufacturers, who do not have the opportunity to weigh in on the assessment through the voting process. Another comment mentions the Order's definitions of "concrete masonry products" and "concrete masonry units" do not clearly delineate the differences between concrete masonry units and concrete masonry products generally. "It is critically important that concrete masonry units be clearly defined, as this definition determines how manufacturers will be taxed and whether they will have a vote in the initial referendum." And, as previously mentioned one commenter felt the list was too expansive as to the definition of "what is a 'concrete masonry unit' well beyond the concrete gray block to include a vast list of concrete masonry products. Extending the assessment to an expanded definition of 'concrete masonry unit' to include specialty products works a hardship on concrete masonry products manufacturers that will not see any benefits from a group commodity marketing program for the specialty, value added, products they have individually developed and marketed at their own expense." And one comment took exception to listing products "other than gray block."

Response:

Manufacturers of concrete masonry products will collect assessments based on the number of concrete masonry units sold. The manufacturers will then remit the collected assessments to the Board. *Concrete masonry unit* means a concrete masonry product that is a manmade masonry unit having an actual width of 3 inches or greater and manufactured from

dry-cast concrete using a block machine. Such term includes concrete block and related concrete units used in masonry applications. While they are concrete masonry products, hardscape products such as pavers and segmental retaining wall units are not concrete masonry units and therefore are not subject to assessment under this Order.

The definition of concrete masonry unit specifically includes items in addition to gray block. The list reflects those concrete masonry products that fall within the definition of concrete masonry unit - a concrete masonry product that is manmade masonry unit have an actual width of 3 inches or greater and manufactured from dry-cast using a block machine. Such term includes concrete block and related concrete units used in masonry applications. As there were no other comments in opposition to the listing, the Department will use this list to identify those products that qualify as a concrete masonry unit. See the previous section whose heading is “Industry Background” for a listing of examples that qualify as concrete masonry units.

Comment:

One commenter stated the “\$0.05 per unit seems excessive and sees no provision requiring any increases be approved by those funding the project. As written, the Board can do it alone. That is five times what is promoted by those in favor of this order.” Another commenter asked to change the rules for assessment increases and “cap it at a lower number because pennies matter and ramping it up would be economically damaging.” Another commenter felt the Board will be “pressured to increase assessments in order to make up for the escrow requirement.” Another commenter felt any change in assessment rate only should be with “a majority vote of qualified and registered manufacturers, the same as needed to put the order in place, vice a two-thirds majority of the Board members.” Another commenter suggested “it would be prudent to set an initial moratorium on assessment changes for the first

five years of the program to better understand the impact of the programs, grants, etc. as a way to avoid a rapid and early assessment increase.”

Response:

The Act and the Order leave to the Board, which represents the interests of the industry, the discretion to make a decision on an appropriate rate within the parameters established in the Act. The Act establishes the initial rate of assessment, provides the authority to change the assessment rate, limits the number to one per year and amount of increase or decrease to one cent per year, and sets \$.05 as a maximum allowable assessment rate. The Order reflects these same criteria. The initial assessment rate on concrete masonry products is \$.01 per concrete masonry unit sold.

As representatives of the industry, the Board members have the collective authority to change the assessment rate if voted by a two-thirds majority of voting members. The rationale for increasing or decreasing this value is at the discretion of the Board, and while the Act does place restrictions on the amount an assessment changes, it does not restrict the manner in which the Board makes this determination.

The Act only places a cap on the number and amount of assessment increases or decreases, it does not preclude the Board from deciding whether to self-impose a limit to the number of increases or a freeze for a duration of time, but any such self-imposed limitation still would be subject to overrule if done so by a two-thirds majority. Lastly, the language found in the Order aligns directly with that in the Act and does not provide the Department with the authority to make changes to the Order as suggested by some of the commenters.

Other checkoff programs

Comment:

Three commenters stated a concrete masonry products checkoff program would be at a disadvantage when compared to other checkoff programs, specifically noting the prohibition on engaging in any promotion, research, or education that would be disparaging to other construction materials as well as a much lower or no escrow account. One commenter thought this clause “could be used to limit or deny the ability to point out the advantages of masonry over other materials. This is a completely unacceptable limitation. How do you plan to protect our right to point out facts of masonry that make it a superior, safer building material than wood in many if not most applications?” Another commenter characterized the apparent disadvantage as “a unilateral disarmament of our industry that allows our competitors to come after us but does not allow us to defend ourselves.”

Response:

The Act is the first that provides the authority for a concrete masonry products checkoff program at the Department of Commerce. The list of prohibited activities in the Act and Order are consistent with those found in checkoff programs within the U.S. Department of Agriculture. Specifically, the Act states the prohibited activities include prohibition on: influencing legislation, elections, or governmental action; engaging in an action that would be a conflict of interest; engaging in advertising that is false or misleading; engaging in any research, education, or promotion that would be disparaging to other construction materials; or engaging in any promotion or project that would benefit any individual manufacturer. As the commenter notes, the prohibition in statutes under which U.S. Department of Agriculture (USDA) operates

is slightly different in that it prohibits engaging in a program that that may be false or misleading or disparaging *to another agricultural commodity*. While this appears to be an incongruity, in practice and as a matter of policy the USDA does not allow its checkoff programs to engage in any action that disparages another commodity, regardless of whether it is agricultural. Of note, the last prohibition listed regarding the prohibition on benefiting *any individual manufacturer* should be read to mean it cannot be for *the sole benefit of any individual manufacturer*.

Notice requirement

Comment:

One commenter stated that the proposed Order has inadequate notice procedures for the referendum.

Response:

The *Federal Register* is the official daily publication for rules, propose rules, and notices of Federal agencies, as well as Executive orders and other Presidential documents. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by 44 U.S.C. 1505, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it (see 44 U.S.C. 1507).

With the exception of Federal holidays, the Office of the Federal Register publishes the *Federal Register* Monday through Friday, by 9 a.m. ET. The Department published referendum procedures in a proposed rule in the *Federal Register* (85 FR 65288, October 15, 2020). The Department provided the public with thirty days to comment. The Department addressed the

comments received in its notice of the final referendum procedures published the referendum procedures final rule published in the *Federal Register* (86 FR 23271, May 3, 2021).

Department's summary of industry background and Regulatory Flexibility Act analysis

Comment:

One commenter took issue and believed invalid the comment made in the Department's Industry background found in the notice of the proposed Order. Specifically, the commenter the Department's statement that "most of the producers acting alone do not have the resources to efficiently market the value of the product or conduct the research and education to promote market growth" The commenter felt that "[w]hile the statement may be true for some smaller manufacturers, this statement does not reflect the reality of producers as a whole." And characterized it as "at best, a very imprecise generalization that does not accurately represent the current educational and promotional efforts of concrete masonry unit construction." By example the commenter explained that there are existing national, state and regional associations meeting these needs and effectively driving different research, education, and promotion priorities. The commenter felt that "[t]o the extent that the Proposed Order is based on the quoted statement, it sits on a weak foundation."

This commenter also felt misleading the Department's observation that between 2007-2017, the number of establishments, number of employees, annual payroll, value added, and value of shipments declined in the industry. The commenter points to the last ten years to state there has been "rapid growth in the concrete masonry unit manufacturing industry. . . . In fact, we have experienced an increase in sale of concrete masonry units of over 50% in this

10-year period.” Again, the commenter believes that “[r]elying on stale, irrelevant data is yet another dubious cornerstone for the proposed Department action.”

Lastly the commenter questioned the Department use of data compiled by industry experts to make decisions. “Yet those experts are not identified, nor is their work presented. At a minimum, the Secretary should identify these experts and provide the experts’ qualifications as well as their reports that the Secretary relied onto make decisions.”

Response:

The analysis to which the commenter refers was not a consideration for the Department’s finding that the Order is consistent with and will effectuate the purpose of the statute. The Department made all its decisions, its findings, and the publication of the proposed Order based on the Act alone and not on the rulemaking Background Information section or the accompanying Regulatory Flexibility Act (RFA) analysis. The section entitled Background Information provided in this rulemaking by the Department was not a finding of fact but rather simply an observation based on the relative size of most of the producers noted in the Department’s RFA and economic analysis of the industry.

The references to “Industry experts” refer to information provided by the National Concrete Masonry Association (NCMA). The total number of estimated concrete masonry units is from the NCMA 2019 CMU Sales Report (<https://ncma.org/updates/news/2019-cmu-sales-survey-released/>). While the Department did not make specific reference to the NCMA survey in its Notice, it did publish with the Order supporting documents on Regs.gov (see <https://www.regulations.gov/document?D=DOC-2020-0002-0004>). Included was the economic analysis from which the regulatory analysis originated and the NCMA report is cited there. To reiterate, the Department’s use of the information was simply to provide a general background of

the industry. While members of the industry submitted a proposal for a draft Order, the Department did not rely on industry experts in its decision-making, and specifically with regard to its determination that the Order is consistent with and will effectuate the purposes of the Act.

The Department concurs with the commenter's example and believes national, regional, and state associations are good illustrations for the premise that by combining and coordinating efforts across producers it can drive and advance the research, education, and promotion of concrete masonry unit construction.

Keep in mind that it is entirely up to the industry whether or not this Order goes into effect. The Order only will become effective based on the results of an industrywide referendum. The Order becomes effective November 29, 2021. The Secretary will publish a determination of the results of the referendum that it has been approved by a majority of manufacturers voting who also represent a majority of the machine cavities in operation of those manufacturers voting in the referendum. In the event the referendum does not reach a majority approval, the Department will publish a document in the *Federal Register* to withdraw this final rule before the effective date.

Intellectual Property

Comment:

One commenter thought that the proposed Order creates confusion as to the ownership of intellectual property.

Response:

The Order outlines the method for establishing ownership of intellectual property that is financed with funds remitted to the Board. A written agreement between the Board and the party receiving funds will establish ownership and allocation of rights to patents, copyrights, inventions, or publications, developed through the use of funds remitted to the Board under the Order.

Referenda

Comment:

Two commenters voiced concern for ensuing referenda, that they allow any concrete masonry product manufacturer to vote, even if they are not subject to the assessment. One commenter states “only manufacturers subject to the assessment should be eligible to vote in any future referenda.” Another commenter stated that while the “initial referendum is limited to manufacturers subject to the assessment, future referenda are not.”

Response:

Eligibility to vote in subsequent referenda will be dependent on the scope of an order and those that would be subject to the assessment of the proposed Order.

The Act covers the concrete masonry products industry and leaves open the potential for other orders, however it limits to one, the number of orders active at any given time. The Department differentiates the current Order with one that may occur in the future. The Department recognizes that a future proposed order may differ significantly from the current

Order, and therefore the Department will base eligibility to vote in a subsequent referendum on the scope of such proposed Order. To make clear that the reference is to future orders and not this Order, the Department states this explicitly in § 1500.81(c).

Comment:

One commenter raised a concern with the two-part criteria the Act provides for approval of the Order. Specifically, the commenter thought “since the assessment is to be based on capacity, the referendum should also be solely based on that criterion. To include an additional requirement that gives every manufacturer, no matter its capacity, an equal vote, not only creates an unrepresentative system, but also creates an incentive structure for companies to modify their corporate structures on the basis of Department regulations rather than market forces.”

Response:

The language in the Order reflects that found in the Act. The Act sets up the two-part voting system. The function of the two-part voting system is a recognition that capacity only should be one consideration. The structure allows small manufacturers to have an equal voice while at the same time providing additional weight to larger manufacturers.

The Department does not think it likely that a business will base its corporate structure decisions on their desire to enhance its participation in the upcoming referendum.

Comment:

One commenter voiced a concern that there is no guidance regarding the process for “how machine cavities in operation will be counted as machine cavities in operation or even how the Secretary will determine what counts as a machine cavity.” Another commenter voiced concern that the Department “will rely on manufacturer’s attestations as to their eligibility as well as providing the number of machine cavities in operation. Will the Department rely on attestations from manufacturers, each of which has incentive to inflate their numbers? . . . And how will the Department count the cavities? Will the Department allow manufacturers to count concrete block molds that could be used in concrete paver machines as cavities? Will the government have to send representatives to every eligible manufacturer to count cavities? Will it rely on uncertain industry data? Given the fundamental importance of the number of operating cavities in determining whether the assessment will be imposed on manufacturers, the absence from the Proposed Order of a proposed method for counting cavities makes it starkly deficient.”

Response:

The Department is sensitive to the concern that additional government audits and inspections can be an encumbrance upon business operations and does not view onsite verification inspections as necessary to determine the total number of machine cavities in operation. Therefore, the Department will rely on the individual manufacturers’ expertise and their attestation as to the number of cavities in operation while reserving the right to conduct onsite visits.

The Department will use the definition as provided in both the Act and the Order. Specifically, machine cavities in operation are those machine cavities associated with a block machine that has produced concrete masonry units within the last six months of the date set for determining eligibility and is fully operable and capable of producing concrete masonry units.

The Government forms a manufacturer will complete require a signed attestation as to the manufacturer's eligibility as well as to the number of machine cavities in operation. Therefore, a manufacturer may number toward its cavity count total those cavities that have produced concrete masonry units within six months of the referendum, regardless of whether it is on a machine designed for the sole purpose of making concrete masonry units.

Both the registration form and ballot form are official government forms. Both have the following statement: the making of any false statement or representation on this form, knowing it to be false, is a violation of Title 18, Section 1001 United States Code, which provides for the penalty of a fine of \$10,000 or imprisonment of not more than five years or both.

While there is a possibility a manufacturer may falsify information required on an official Government form as suggested by one commenter to "inflate their numbers", the Department does not equate the ability to do so with the likelihood it will happen. However, the Department certainly reserves the right to conduct inspections to verify a manufacturer's attestation. The Secretary's authority to inspect, the knowledge of penalties the Secretary has available against a person who willfully violates an Order issued by the Secretary, as well as the future requirement to provide such information and complete evaluation and compliance requirements are strong safeguards against actions of fraud. The Department believes these verification techniques provide the needed dis-incentive to falsify information required on an official Government form.

Comment:

One commenter thought the "Checkoff program approval process requiring more than 50% approval in companies and cavities means some companies are going to be assessed without their consent, which is fundamentally inconsistent with their family values".

Response:

An effective Order makes the assessment mandatory (concerning the mandatory nature of the Order, see the previous reply under the heading "Regional and state-based checkoff programs"). The Act sets out the criteria needed for the Order to become effective. Specifically, the Act provides that the order shall become effective only if the Secretary determines that the order has been approved by a majority of manufacturers voting who also represent a majority of the machine cavities in operation of those manufacturers voting in the referendum. The Department encourages all eligible manufactures to participate in the referendum to make sure "their voices are heard." A majority is anything over 50%, therefore the commenter is correct that if the referendum succeeds and the Order goes into effect, those that were opposed to the Order and those who fail to participate in the referendum still are subject to the Order and the Department will require them to pay assessments. The reverse also is true, if the referendum fails, those that wanted a program are without.

Comment:

One commenter thought it is "critically important that concrete masonry units be clearly defined, as this definition determines how manufacturers will be assessed and whether they will have a vote in the initial referendum."

Response:

The Act and the Order use the same language to define these two terms. As noted previously, the definition of concrete masonry products clearly distinguishes a concrete masonry unit from hardscape products such as concrete pavers and segmental retain wall units. In its

notice, the Department took the additional step of listing concrete masonry products that it considers to be concrete masonry units (and therefore subject to the assessment). The Department did not receive any comments on this list.

The Act is clear that Board membership is not to be limited to concrete masonry unit manufacturers (i.e. those subject to the assessment). Specifically, the Act provides that “[t]he Board shall consist of manufacturers,” 15 U.S.C. 8704(b)(1)(B)(iii); “manufacturers” is defined as “any person engaged in the manufacturing of commercial concrete masonry products in the United States.” 15 U.S.C. 8702(12). The Act further provides that “[t]o ensure fair and equitable representation of the concrete masonry products industry, the composition of the Board shall reflect the geographical distribution of the manufacture of concrete masonry products in the United States, *the types of concrete masonry products manufactured*, and the range in size of manufacturers in the United States.” 15 U.S.C. 8704(b)(2)(A) (emphasis added). Thus, the Act is unambiguous that all concrete masonry manufacturers are eligible for Board membership and not just concrete masonry unit manufacturers, and the Order reflects that statutory directive.

Reimbursement to the Government and Board administrative costs

Comment:

Three commenters were concerned about the reimbursement mandate in the Order. One commenter stated “the Act calls for the requirement to reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration, and supervision of the order, including all referendum costs in connection with the order. There does not seem to be a cap on these expenses.” “Rather than sign a blank check,” another commenter proposed to place “a 10% cap on government expenses.”

Response:

In addition to being a coordinated program of research, education and promotion to improve, maintain, and develop markets for concrete masonry products, there are several benefits to a Federally run checkoff program. Among others it includes oversight of Board operations, adherence to stated intended purpose, nationwide coordination, and the ability make participation mandatory. The concrete checkoff program authorized by the Act is consistent with other federally-mandated checkoff programs. The Act specifically requires reimbursement from assessments for all expenses incurred by the Secretary in the implementation, administration, and supervision of the order, including all referenda costs incurred in connection with the Order.

All Federal checkoff programs require the affected industry to reimburse the Government for its expenses. The service the Government is providing is specific to an industry and the nature of the checkoff programs allows the Government to provide assistance and oversight, but normally does not use appropriated money to do so. The industry desiring the government assistance and oversight provides full reimbursement, so the benefit and expense to enact such program falls upon the industry and not the taxpayer at large.

Comment

Three commenters believed the proposed Order's allowance for the Board “to spend 10% of assessments and other funds on the cost of collection of expenses and administrative staff is too high.” One commented that there is “no limit to the number of employees” with a concern that “no mechanism exists to ensure expenses in the future remain limited and reasonable.”

Response:

The Act allows for initial start-up costs but then establishes a cap on that type of spending. It would seem in the Board's best self-interest to minimize administrative costs and maximize the funding for research, education, and promotion programs. Regardless, beginning in the third year after the establishment of the Board, the Act limits to 10 percent of the assessment and other income received, the Board's expenditures for administration. This excludes payment into escrow and reimbursement to the Secretary required under § 1500.50(f) and (h). The Act's use of a percentage for a cap on administrative costs is both a limiting factor and what Congress considered reasonable.

Executive Order 12866

This rulemaking is not a significant regulatory action under Executive Order 12866.

List of Subjects in 15 CFR Part 1500

Administration practice and procedure, Assessments, Business and industry, Checkoff program, Concrete masonry products, Confidential business information, Education, Non-agricultural commodities, Promotion activities, Reporting and recordkeeping requirements, Research.

For the reasons stated in the preamble, the Under-Secretary for Economic Affairs amends 15 CFR part 1500 as set forth below:

PART 1500 – CONCRETE MASONRY PRODUCTS RESEARCH, EDUCATION, AND PROMOTION

1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 8701-8717.

2. Add subpart A to read as follows:

Subpart A - Concrete Masonry Products Research, Education, and Promotion Order

Sec.

Definitions

1500.0 Order.

1500.1 Act.

1500.2 Block machine.

1500.3 Board.

1500.4 Cavity.

1500.5 Concrete masonry products.

1500.6 Concrete masonry unit.

1500.7 Conflict of interest.

1500.8 Department.

1500.9 Dry-cast concrete.

1500.10 Education.

1500.11 Geographic regions.

1500.12 Machine cavities.

1500.13 Machine cavities in operation.

1500.14 Manufacturer.

1500.15 Masonry unit.

1500.16 [Reserved]

1500.17 Person.

1500.18 Promotion.

1500.19 Research.

1500.20 Secretary.

1500.21 United States.

Concrete Masonry Products Board

1500.40 Establishment and membership.

1500.41 Nominations and appointments.

1500.42 Term of office.

1500.43 Vacancies.

1500.44 Disqualification.

1500.45 Procedure.

1500.46 Compensation and reimbursement.

1500.47 Powers and duties.

1500.48 Prohibited activities.

Expenses and Assessments

1500.50 Budget and expenses.

1500.51 Assessments.

1500.60 Programs and projects.

1500.61 Independent evaluation.

1500.62 Patents, copyrights, trademarks, information, publications, and product formulations.

Reports, Books, and Records

1500.70 Reports.

1500.71 Books and records.

1500.72 Confidential treatment.

Miscellaneous

1500.80 Right of the Secretary.

1500.81 Referenda.

1500.82 Suspension or termination.

1500.83 Effect of termination or amendment.

1500.84 Notice and advance registration.

1500.85 Personal liability.

1500.86 Separability.

1500.87 Amendments.

1500.88 OMB control number.

Subpart A - Concrete Masonry Products Research, Education, and Promotion Order

Definitions

§ 1500.0 Order.

Order means this subpart A, Concrete Masonry Products Research, Education, and Promotion Order.

§ 1500.1 Act.

Act means the Concrete Masonry Products Research, Education, and Promotion Act of 2018 (15 U.S.C. 8701 et seq.; Pub. L. No. 115-254, section 1301, 132 Stat. 3469 – 3485 (2018)), and any amendments thereto.

§ 1500.2 Block machine.

Block machine means a piece of equipment that utilizes vibration and compaction to form concrete masonry products.

§ 1500.3 Board.

Board means the “Concrete Masonry Products Board” established under § 1500.40 of this Order.

§ 1500.4 Cavity.

Cavity means the open space in the mold of a block machine capable of forming a single concrete masonry unit having nominal plan dimensions of 8 inches by 16 inches.

§ 1500.5 Concrete masonry products.

Concrete masonry products means a broader class of products, including concrete masonry units as well as hardscape products such as concrete pavers and segmental retaining wall units, manufactured on a block machine using dry-cast concrete.

§ 1500.6 Concrete masonry unit.

Concrete masonry unit means a concrete masonry product that is a manmade masonry unit having an actual width of 3 inches or greater and manufactured from dry-cast concrete using a block machine. Such term includes concrete block and related concrete units used in masonry applications.

§ 1500.7 Conflict of interest.

Conflict of interest means with respect to a member or employee of the Board, a situation in which such member or employee has a direct or indirect financial or other interest in a person that performs a service for, or enters into a contract with, for anything of economic value.

§ 1500.8 Department.

Department means the United States Department of Commerce.

§ 1500.9 Dry-cast concrete.

Dry-cast concrete means a composite material that is composed essentially of aggregates embedded in a binding medium composed of a mixture of cementitious materials (including hydraulic cement, pozzolans, or other cementitious materials) and water of such a consistency to maintain its shape after forming in a block machine.

§ 1500.10 Education.

Education means programs that will educate or communicate the benefits of concrete masonry products in safe and environmentally sustainable development, advancements in concrete masonry product technology and development, and other information and programs designed to generate increased demand for commercial, residential, multi-family, and institutional projects using concrete masonry products and to generally enhance the image of concrete masonry products.

§ 1500.11 Geographic regions.

Geographic Regions means the groupings of states as delineated in this Order (at § 1500.40(c)), for the purpose of supporting research, education, and promotion plans and projects.

§ 1500.12 Machine cavities.

Machine cavities means the cavities with which a block machine could be equipped.

§ 1500.13 Machine cavities in operation.

Machine cavities in operation means those machine cavities associated with a block machine that have produced concrete masonry units within the last six months of the date set for determining eligibility and is fully operable and capable of producing concrete masonry units.

§ 1500.14 Manufacturer.

Manufacturer means any person engaged in the manufacturing of commercial concrete masonry products in the United States.

§ 1500.15 Masonry unit.

Masonry unit means a noncombustible building product intended to be laid by hand or joined using mortar, grout, surface bonding, post-tensioning or some combination of these methods.

§ 1500.16 [Reserved]

§ 1500.17 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or any other entity.

§ 1500.18 Promotion.

Promotion means any action, including paid advertising, to advance the image and desirability of concrete masonry products with the express intent of improving the competitive position and stimulating sales of concrete masonry products in the marketplace.

§ 1500.19 Research.

Research means studies testing the effectiveness of market development and promotion efforts, studies relating to the improvement of concrete masonry products and new product development, and studies documenting the performance of concrete masonry.

§ 1500.20 Secretary.

Secretary means the Secretary of the United States Department of Commerce.

§ 1500.21 United States.

United States means the several States and the District of Columbia.

Concrete Masonry Products Board

§ 1500.40 Establishment and membership.

(a) The Board is hereby established to carry out a program of generic promotion, research, and education regarding concrete masonry products. The Board shall consist of manufacturers and of not fewer than 15 and not more than 25 members appointed by the Secretary, from nominations submitted as set forth in § 1500.41. No employee of an industry trade organization exempt from tax under paragraph (3) or (6) of section 501(c) of the Internal Revenue Code of 1986 representing the concrete masonry industry or related industries shall serve as a member of the Board and no member of the Board may serve concurrently as an officer of the board of directors of a national concrete masonry products industry trade association.

(b) The initial Board and all subsequent Boards, unless modified by the Board as provided in paragraph (d) of this section, shall be subject to the following:

(1) To ensure fair and equitable representation of the concrete masonry products industry, the composition of the Board shall reflect the geographical distribution of the manufacture of concrete masonry products in the United States, the types of concrete masonry products manufactured, and the range in size of manufacturers in the United States.

(2) No company or its affiliates shall have more than two members on the Board.

(c) To the extent possible, dependent on the nominees submitted, the Secretary will strive to appoint at least two members from each region. Similarly, the Secretary will strive to appoint at least one member from each of the following districts:

Table 1 to paragraph (c)

Region	District	States
1	1	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont
	2	New York
	3	Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, and West Virginia
2	4	North Carolina, South Carolina, and Virginia
	5	Alabama, Georgia, Mississippi, and Tennessee
	6	Florida
3	7	Indiana, Kentucky, and Ohio
	8	Illinois, Michigan, and Wisconsin
	9	Iowa, Minnesota, Nebraska, North Dakota, and South Dakota
4	10	Arkansas, Kansas, Missouri, and Oklahoma
	11	Louisiana, and Texas
	12	Arizona, and New Mexico
5	13	Colorado, Utah, and Wyoming
	14	Alaska, Idaho, Montana, Oregon, and Washington
	15	California, Hawaii, and Nevada

(d) Three years after the assessment of concrete masonry units commences pursuant to implementation of this Order, and at the end of each three-year period thereafter, the Board,

subject to the review and approval of the Secretary, shall, if warranted, recommend to the Secretary the reapportionment of the Board membership to reflect changes in the geographical distribution of the manufacture of concrete masonry products and the types of concrete masonry products manufactured. Additionally, at any time, the Board may make recommendations to the Secretary to modify the composition of the regions and districts set forth in paragraph (c) of this section.

§ 1500.41 Nominations and appointments.

(a) For the initial Board, nominations shall be made and submitted to the Secretary by manufacturers. The Secretary shall consider the nominations submitted and other manufacturers for appointment, as the Secretary may deem appropriate. The Secretary shall appoint the members and alternate members of the initial Board.

(b) From the nominations, the Secretary shall appoint the 15-25 members of the Board and 6 alternate members of the Board within a reasonable time after receiving nominations. If a voting member vacates the appointment, the Secretary will appoint one of the alternate members to fill the unexpired term. The Secretary will provide the Board an opportunity to offer a nominee as successor to fill the term of the alternate member. In any case in which the Board fails to submit nominations for any open position, the Secretary shall appoint a member qualifying for the position under the criteria set forth in § 1500.40.

(c) As terms expire or vacancies occur among members and alternate members, nominations and those interested in being considered for Board membership, including self-nominations, may submit such nominations to the Board. For each expired or vacant position, the Board will evaluate the nominations received, verify the willingness of nominees to serve, and then will submit to the Secretary at least three nominees for each such position. The Secretary may also receive nominations and may forward them to the Board for their consideration. The Secretary is not bound by the recommendations of the Board; in selecting

members, the Secretary will consider the recommendations of the Board, individual expertise, distribution of appointments, and more expansive input from sources available to the Secretary. For the initial Board, from the list of nominees not selected for appointment, the Secretary will choose and appoint six alternate members for the Board. Alternate members will be non-voting members of the Board.

§ 1500.42 Term of office.

(a) Board members and any alternates will serve for a term of three years, except for the initial members as described below. Board members and any alternates will be able to serve a maximum of two consecutive three-year terms and may serve additional terms, of up to two consecutive three-year terms, after rotating off the Board. When the Board is first established, the initial members will be assigned initial terms of two, three and four years. Initial terms will be staggered to assure continuity. Each term of office will end on December 31, with new terms of office beginning on January 1. Members serving the initial terms of two and three years will be eligible to serve a second term of three years.

(b) Thereafter, each of the positions will carry a full three-year term. Notwithstanding the limitations on consecutive terms, a Board member or alternate Board member may continue to serve until a successor is appointed by the Secretary.

§ 1500.43 Vacancies.

Should any Board member position become vacant, an alternate will be appointed by the Secretary for the remainder of the term. Successors to fill the unexpired terms of the former alternate member shall be appointed in the manner specified in § 1500.41.

§ 1500.44 Disqualification.

(a) In the event that any Board member or alternate Board member who was appointed as a manufacturer ceases to qualify as a manufacturer, such Board member or alternate Board

member shall be disqualified from serving on the Board. The replacement may be at the Secretary's initiative or the Board may recommend to the Secretary that the member be removed.

(b) If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office.

(c) All members serve at the pleasure of the Secretary.

§ 1500.45 Procedure.

(a) The Board will meet at least annually. A Board meeting will be conducted only when a quorum is present. A majority of the Board members will constitute a quorum. If participation by telephone or other means is permitted, members participating by such means shall count as present in determining quorum or other voting requirements set forth in this section.

(b) At the start of each fiscal period, the Board will select a Chair, Vice- Chair, Secretary-Treasurer and other officers as appropriate who will serve in leadership roles throughout that period.

(c) The Board will provide members and manufacturers a minimum of 14 days advance notice of all Board meetings.

(d) Each Board member will be entitled to one vote on any matter put to vote, and the motion will carry if supported by one vote more than 50 percent of the total votes represented by the Board members participating, with the exception of the affirmative vote of two-thirds of voting members required to change the assessment rate as specified in § 1500.51(c).

(e) The Board may form committees as necessary. Committees may consist of individuals other than Board members. Committee members shall serve without compensation.

(f) When the Board Chair determines that a vote outside a convened Board meeting is necessary, such vote may take place via electronic means only if members are given fourteen days prior notice, and if a majority of the voting Board members participate prior to the established deadline. Any action so taken shall have the same force and effect as though such action had been taken at a regularly convened meeting of the Board.

(g) All votes shall be recorded in Board minutes.

(h) There shall be no voting by proxy.

(i) Board members shall each have one vote. Alternate members shall not vote. The Chair and all Board officers shall be elected from voting members of the Board.

(j) The organization of the Board and the procedures for the conducting of meetings of the Board shall be in accordance with its bylaws, which shall be established by the Board and approved by the Secretary.

(k) Meetings of the Board and committees may be conducted by electronic communications, provided that each member and committee member, if such committee member is not a member of the Board, is given prior written notice of the meeting and has the opportunity to be present either physically or by electronic connection.

§ 1500.46 Compensation and reimbursement.

(a) Members and any alternates of the Board shall serve without compensation.

(b) If approved by the Board, members or alternates shall be reimbursed for reasonable travel expenses, which may include per diem allowance or actual subsistence incurred while away from their homes or regular places of business in the performance of services for the Board.

§ 1500.47 Powers and duties.

The Board shall have the following powers and duties:

- (a) To administer this Order in accordance with its terms and conditions and to collect assessments;
- (b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board;
- (c) To make such rules as may be necessary to administer this Order, including activities to be carried out under this Order;
- (d) To meet, organize, and select from among the members of the Board a Chair, Vice Chair, Secretary-Treasurer and other officers, committees, and subcommittees, and to vest in such committees and subcommittees such responsibilities and authorities as the Board determines to be appropriate;
- (e) To establish regional committees to administer regional initiatives;
- (f) To recommend to the Secretary modifications to the geographical regions as described in § 1500.40(c);
- (g) To establish working committees of persons other than Board members;
- (h) To employ persons, other than the members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons;
- (i) To prepare and submit for the approval of the Secretary a budget as described in § 1500.50(a);
- (j) To borrow funds necessary for the startup expenses of this Order;
- (k) To develop and carry out generic research, education, and promotion programs and projects relating to concrete masonry products, and to pay the costs of such programs and

projects with assessments collected under § 1500.51 and other income of the Board as provided under §§ 1500.50(j) and 1500.62;

(l) To enter into contracts or agreements which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, education, and promotion relating to concrete masonry products, including with manufacturer associations or other entities as considered appropriate by the Secretary;

(m) To develop programs and projects, and enter into contracts or agreements related thereto, which must be approved by the Secretary before becoming effective, targeted specifically toward the Geographic Regions described in § 1500.40(c) to be recommended by the relevant regional committees for marketing and research projects to benefit manufacturers in such Geographic Regions pursuant to the goals of any programs or projects as set forth under this Order. The contracts or agreements related to such programs and projects as described in this § 1500.46(m) shall be subject to the requirements of all contracts or agreements described in § 1500.46(l);

(n) To keep minutes, books, and records that reflect the actions and transactions of the Board, and promptly report minutes of each Board meeting to the Secretary;

(o) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe and to make the records available to the Secretary for inspection and audit; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(p) At the end of each fiscal year and at such other times as the Secretary may request, to have the books and records audited by an independent auditor and submit a report of the audit directly to the Secretary;

(q) To give the Secretary the same notice of meetings of the Board and committees as is given to members, including committee members if committee members are not members of the Board, in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Board and all committees to the Secretary;

(r) To furnish to the Secretary any information or records that the Secretary may request;

(s) To receive, investigate, and report to the Secretary all complaints of violations of this Order;

(t) To recommend to the Secretary such amendments to this Order as the Board considers appropriate;

(u) To recommend adjustments to the assessments as provided in this Order;

(v) To notify manufacturers of all Board meetings through press releases or other means;

(w) To invest assessments collected under this Order in accordance with § 1500.50; and

(x) To periodically prepare and make available to the public and manufacturers reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended.

§ 1500.48 Prohibited activities.

(a) The Board shall not engage in any program or project to, nor shall any funds received by the Board under the Act be used to:

(1) Influence legislation, elections, or governmental action;

(2) Engage in an action that would be a conflict of interest;

(3) Engage in advertising that is false or misleading;

(4) Engage in any research, education, or promotion that would be disparaging to other construction materials; or

(5) Engage in any promotion or project that would benefit any individual manufacturer.

(b) Paragraph (a) of this section does not preclude:

(1) The development and recommendation of amendments to the Order;

(2) The communication to appropriate government officials of information relating to the conduct, implementation, or results of research, education, and promotion activities under the Order except communications described in paragraph (a)(1) of this section; or

(3) Any lawful action designed to market concrete masonry products directly to a foreign government or political subdivision of a foreign government.

Expenses and Assessments

§ 1500.50 Budget and expenses.

(a) Prior to the beginning of each fiscal year, and during the fiscal year as may be necessary, the Board shall prepare and submit to the Secretary for approval a budget for the fiscal year covering its anticipated expenses and disbursements in administering this Order, including the probable cost of each promotion, research, and education activity proposed to be developed or carried out by the Board and a section that annotates and explains any shortcomings, overruns, and shift of funds from the previous year's budget. Such budget shall be deemed approved if the Secretary fails to approve or reject the budget within 60 days of receipt, unless the Secretary proposes to the Board and to Congress, reasonable justification for the delay and provides a reasonable date by which approval or disapproval will be made. The Department may provide such justification in any written format.

(b) In addition to paragraph (a) of this section, each such budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project, with a comparative for the preceding year - annotating the success and explaining the shortcomings of the preceding year's programs, plans, and projects

(2) A summary of anticipated revenue, with comparative data for at least one preceding year (except for the initial budget);

(3) A summary of proposed expenditures for each program, plan or project; and

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

(c) Each budget shall provide adequate funds to defray its proposed expenditures.

(d) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program or project to another. A shift of funds from one approved category to another, and not exceeding 10% of the funds in either category, which does not cause an increase in the Board's approved budget and which is consistent with governing bylaws need not have prior approval by the Secretary. If the Secretary fails to approve or reject a budget, or an amendment or addition to an approved budget, within 60 days of receipt, such budget shall be deemed approved, unless the Secretary provides to the Board and to Congress, in writing, reasonable justification for the delay and provides a reasonable date by which approval or disapproval will be made. The Department may provide such justification in any written format.

(e) The Board is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this Order. Such expenses shall be paid from funds received by the Board.

(f) Limitations on obligation of funds:

(1) In each fiscal year, through fiscal year 2030, the Board may not obligate an amount greater than the sum of—

(i) 73 percent of the amount of assessments estimated to be collected under § 1500.51 in such fiscal year);

(ii) 73 percent of the amount of assessments actually collected under § 1500.51 in the most recent fiscal year for which an audit report has been submitted as of the beginning of the fiscal year for which the amount that may be obligated is being determined, less the estimate made pursuant to paragraph (e)(1) of this section for such most recent fiscal year; and

(iii) Amounts permitted in preceding fiscal years to be obligated that have not been obligated.

(iv) For fiscal years 9 and 10 (ending September 2028 and 2029) there is a special rule for estimates. Specifically, the amounts estimated to be collected shall be 62 percent of the amount of assessments actually collected in the most recent fiscal year for which an audit report has been submitted as of the beginning of the fiscal year for which the amount be obligated is being determined.

(2) Assessments collected in excess of the amount permitted to be obligated in a fiscal year shall be deposited in an escrow account until the end of the 11th fiscal year or September 2030.

(3) Prior to the end of the 11th fiscal year or September 30, 2030, the Board may not obligate, expend, or borrow against amounts deposited in the escrow account. Any interest earned on such amounts shall be deposited in the escrow account and shall be unavailable for obligation until the end of the 11th fiscal year or September 30, 2030.

(g) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays.

(h) The Board shall reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration and supervision of this Order, including all referendum costs in connection with this Order.

(i) Following the third fiscal year of operation of the Board, the total cost of collection of expenses and administrative staff incurred by the Board during any fiscal year shall not exceed 10 percent of the projected total assessments to be collected and other income received by the Board for that fiscal year after any fees owed to the Department are paid. Reimbursements to the Secretary required under paragraph (g) of this section are excluded from this limitation on spending.

(j) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Board may invest assessments and all other revenues collected under this section in:

- (1) Obligations of the United States or any agency of the United States;
- (2) General obligations of any state or any political subdivision of a state;
- (3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System; or
- (4) Obligations fully guaranteed as to principal interest by the United States.

(k) Investment income and revenue earned under paragraph (i) of this section are earnings obtained from assessments that are subject to budget approval under paragraph (a) of this section.

§ 1500.51 Assessments.

(a) The collection of assessments on concrete masonry units will be the responsibility of the manufacturer who sells the concrete masonry units. There shall be an assessment on the first sale of concrete masonry units only and not on subsequent sales of concrete masonry units already assessed. The manufacturer will be required to collect and remit its individual assessments no less than quarterly. Manufacturers shall identify the total amount due in assessments on all sales receipts, invoices or other commercial documents of sale as a result of the sale of concrete masonry units. Within 180 days of their initial meeting, the Board will provide for review and approval by the Secretary a proposed evaluation and compliance program and its plan to evaluate program effectiveness and to verify compliance with the Act. The evaluation and compliance program will provide the method and metrics that will help determine program effectiveness and will outline the way the Board will receive assessments, how they will verify compliance, determine the best method to track sales, and how to document all actions including the process by which the Board will use to ensure it meets or exceeds the legislatively-mandated disbursement of received assessments.

(b) Such assessments shall be levied at a rate of \$0.01 per concrete masonry unit sold by a manufacturer. The Board may make assessments effective as of the effective date of this Order. Submission of funds may be made to the Board within 60 days of the end of the first quarter after the Board is established; thereafter submission of funds will be to the board within 60 days of the end of each quarter.

(c) At any time following the conduct of the initial referendum conducted pursuant to this Order, the assessment rate will be reviewed by the Board and, upon the affirmative vote of two-thirds of voting members of the Board, may be modified; provided that the assessment rate may be raised to a maximum of \$0.05 cents per unit, that only one increase may be implemented in any one-year period, and each individual increase may not exceed \$0.01

(d) Not less than 50 percent of the assessments (less administration expenses) paid by a manufacturer shall be used to support research, education, and promotion programs and projects in support of the Geographic Region of the manufacturer.

(e) All assessment payments and reports will be submitted to the Board quarterly. All quarterly payments are to be received no later than 60 days after the conclusion of each quarter. A late payment charge shall be imposed on any manufacturer who fails to remit to the Board the total amount for which any such manufacturer is liable on or before the due date established by the Board. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the manufacturer is liable. The rate of interest and late payment charges shall be specified by the Secretary.

(f) Manufacturers failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures.

(g) The Board may authorize other organizations to collect assessments on its behalf with the approval of the Secretary.

(h) The Board shall provide manufacturers submitting assessments under this Order with the opportunity to apply for rebates on assessments remitted to the Board for concrete masonry units not covered by this Order and for assessments remitted to the Board for concrete masonry units sold to a purchaser that subsequently failed to remit payment due to bankruptcy, bad debt or other reasons causing the money intended to be collected from such sale to be uncollectible. Those requesting rebates in such circumstances must provide all necessary documentation as the Board shall determine.

§ 1500.60 Programs and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program or project authorized under this Order. Such programs or projects shall be consistent with the purpose of the Act (*see* 15 USC 8701) and provide for:

(1) The establishment of annual research, education, and promotion objectives and metrics for each fiscal year. Objectives and performance metrics should consider and where possible reflect those listed in 15 USC 8716 (Study and report by the Government Accounting Office).

(2) The establishment, issuance, effectuation and administration of appropriate programs for research, education, and promotion with respect to concrete masonry products; and

(3) The establishment and conduct of research with respect to the image, desirability, use, marketability, quality or production of concrete masonry products, to the end that the marketing and use of concrete masonry products may be encouraged, expanded, improved or made more acceptable and to advance the image, desirability or quality of concrete masonry product.

(b) No program or project shall be implemented prior to its approval by the Secretary. Once a program or project is so approved, the Board shall take appropriate steps to implement it. If the Secretary fails to approve or reject a contract or agreement for a program or project within 60 days of receipt, the contract or agreement shall be deemed approved, unless the Secretary provides to the Board and to Congress, in writing, reasonable justification for the delay and provides a reasonable date by which approval or disapproval will be made. The Department may provide such justification in any written format. Any such contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program or project together with a budget or budgets that specifies the cost to be incurred to carry out the program or project;

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Board may require;

(3) The Secretary may audit the records of the contracting or agreeing party periodically;

(4) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor; and

(5) The contract or agreement shall become effective on the approval of the Secretary.

(c) Each program or project implemented under this Order shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of research, education, or promotion. If it is found by the Board that any such program or project does not contribute to an effective program of research, education, or promotion, then the Board shall, with the approval of the Secretary, terminate such program or project.

(d) Any educational or promotional activity undertaken with funds provided by the Board shall include a statement that such activities were supported in whole or in part by the Board.

(e) Every 2 years the Board shall prepare and make publicly available a comprehensive and detailed report that includes an identification and description of all programs and projects undertaken by the Board during the previous 2 years as well as those planned for the subsequent 2 years and detail the allocation or planned allocation of Board resources for each such program or project. Such report shall also include:

(1) The overall financial condition of the Board;

(2) A summary of the amounts obligated or expended during the 2 preceding fiscal years;

and

(3) A description of the extent to which the objectives of the Board were met according to the metrics required under § 1500.50.

§ 1500.61 Independent evaluation.

The Board shall authorize and fund an independent evaluation of the effectiveness of this Order and other programs conducted by the Board beginning five years after October 5, 2018, and every 3 years thereafter. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

§ 1500.62 Patents, copyrights, trademarks, information, publications, and product formulations.

Ownership and allocation of rights to patents, copyrights, inventions, or publications, developed through the use of non-Federal funds remitted to the Board under the Order shall be determined by written agreement between the Board and the party(ies) receiving funds for the development of such inventions, patents, copyrights or publications.

Reports, Books, and Records

§ 1500.70 Reports.

(a) Each manufacturer subject to this Order may be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

- (1) Number and type of concrete masonry units manufactured;
- (2) Number and type of concrete masonry units on which an assessment was paid;
- (3) Name and address of the manufacturer; and
- (4) Date assessment was paid on each concrete masonry unit sold.

(b) All reports required under this section are due to the Board 60 days after the end of each quarter.

(c) All reports or information submitted pursuant to this paragraph shall be subject to the confidentiality restrictions in § 1500.72.

§ 1500.71 Books and records.

Each manufacturer subject to this Order shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this Order, including such records as are necessary to verify any reports required. Such records shall be retained for at least 7 years beyond the fiscal period of their applicability.

§ 1500.72 Confidential treatment.

(a) Trade secrets and commercial or financial information that is privileged or confidential obtained from books, records, or reports under the Act, this Order shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members or manufacturers. Only those persons having a specific need for such information to effectively administer the provisions of this Order shall have access to such information. Such information may be disclosed only if the Secretary considers the information relevant; and the information is revealed in a judicial proceeding or administrative hearing brought at the direction or on the request of the Secretary or to which the Secretary or any officer of the Department is a party. Any officer, employee, or agent of the Department of Commerce or any officer, employee, or agent of the Board who willfully violates this paragraph shall be fined not more than \$1,000 and imprisoned for not more than 1 year, or both. Nothing in this section shall be deemed to prohibit:

(1) The issuance of general statements based upon the reports of the number of persons subject to this Order or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(2) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this Order, together with a statement of the particular provisions of this Order violated by such person.

(b) For any officer, employee, or agent of the Department of Commerce, these provisions are consistent with and do not supersede, conflict with, or otherwise alter any obligations, rights, or liabilities created by existing statute or Executive order relating to classified information, communications to Congress, the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive Orders and statutory provisions are incorporated into this Order and are controlling.

Miscellaneous

§ 1500.80 Right of the Secretary.

All fiscal matters, programs or projects, rules or regulations, reports, or other actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1500.81 Referenda.

(a) A referendum will be held to determine whether manufacturers favor enactment of this Order. A manufacturer shall be considered eligible to vote if the manufacturer has manufactured concrete masonry products during a period of at least 180 days prior to the first day of the period during which voting in the referendum will occur. For the initial referendum, an eligible person is a manufacturer of concrete units that is subject to the initial rate of

assessment in § 1500.51. Each manufacturer eligible to vote in the referendum shall be entitled to one vote. This Order became effective after approval by a majority of manufacturers voting who also represent a majority of the machine cavities in operation of those manufacturers voting in the referendum.

(b) After the initial referendum, the Secretary shall conduct a referendum upon the request of the Board, or effective beginning November 30, 2026, and at 5-year intervals thereafter, by petition from not less than 25% of manufacturers eligible to vote. Each manufacturer eligible to vote in subsequent referenda shall be entitled to one vote. The Order will remain in effect if approved by a majority of manufacturers voting who also represent a majority of the machine cavities in operation of those manufacturers voting in the referendum.

(c) For any new proposed order, voter eligibility will be based on the scope of such proposed order. A future proposed Order becomes effective if approved by a majority of manufacturers voting and any other criteria established by the Secretary based on the scope of such future proposed order.

§ 1500.82 Suspension or termination.

(a) The Secretary shall suspend or terminate an order or a provision of an order if the Secretary finds that an order or provision of an order obstructs or does not tend to effectuate the purpose of the Act, or if the Secretary determines that the order or a provision of an order is not favored by a majority of all votes cast in the referendum as provided in § 1500.81. If the Secretary suspends or terminates a provision of an order, the order remains in effect minus the suspended or terminated provision.

(b) If, as a result of a referendum conducted under § 1500.81 of this Order, the Secretary determines that the Order is not approved, the Secretary shall:

(1) Not later than 180 days after making the determination, suspend or terminate collection of assessments under this Order; and

(2) As soon as practical, suspend or terminate activities under this order in an orderly manner.

§ 1500.83 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this Order, or the issuance of any amendment, shall not:

(a) Affect or waive any right, duty, obligation or liability which shall have arisen, or which may thereafter arise in connection with any provision of this Order;

(b) Release or extinguish any violation of this Order; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any other persons, with respect to any such violation.

§ 1500.84 Notice and advance registration.

At least 30 days before a referendum is to be conducted under this Order, the Secretary shall notify all manufacturers of the period during which the referendum will occur through publication in the Federal Register. The notice shall explain any registration and voting procedures. A manufacturer who chooses to vote in any referendum conducted under this Order shall register with the Secretary prior to the voting period.

§ 1500.85 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, when they exercise their discretionary duties of their office, in good faith, while acting within the scope of their authority, to any person for errors in judgment,

either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct

§ 1500.86 Separability.

If any provision of this Order is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this Order or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1500.87 Amendments.

The Secretary may, from time to time, amend an Order. Amendments to this Order may be proposed from time to time by the Board or by any interested person affected by the provisions of the Act, including the Secretary. The provisions of the Act applicable to an order shall be applicable to any amendment to this Order.

§ 1500.88 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., is OMB control number 0605-0028.

Dated: August 20, 2021.

Kenneth White

Senior Policy Analyst, Under Secretary for Economic Affairs.